



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

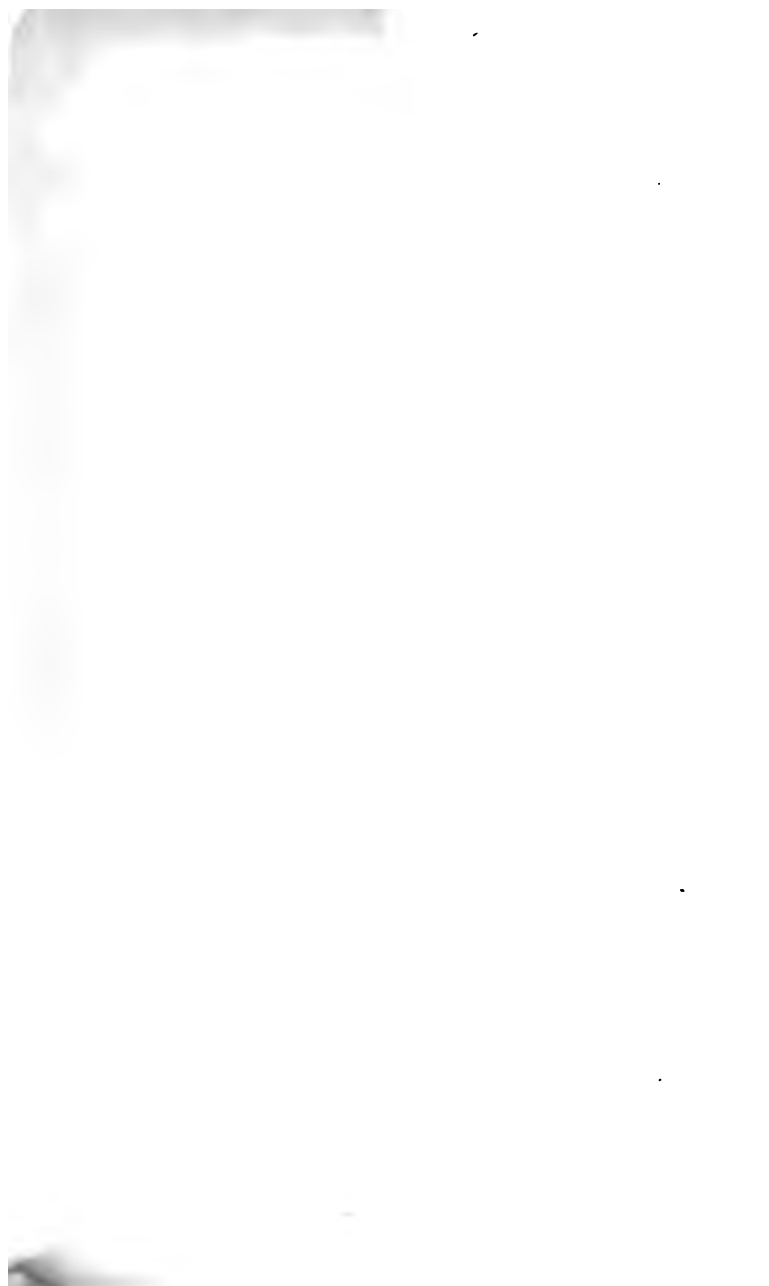
- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



**POCKET
CODE OF EVIDENCE**



A
POCKET CODE
OF THE RULES OF
EVIDENCE
IN TRIALS AT LAW

BY
JOHN HENRY WIGMORE

**Professor of the Law of Evidence in the Law School of
Northwestern University**
Author of "A Treatise on the System of Evidence,"
editor of "Cases on Evidence"

BOSTON
LITTLE, BROWN, AND COMPANY
1910

Copyright, 1910,
By JOHN H. WIGMORE.

All rights reserved

Y 11
XO 111. 1301
Y 113

96072

Electrotyped and Printed by
THE COLONIAL PRESS
C. H. Simonds & Co., Boston, U.S.A.

TO
OLIVER WENDELL HOLMES
JUSTICE OF THE SUPREME COURT OF THE UNITED STATES
IN GRATEFUL ACKNOWLEDGMENT
OF LOFTY IDEALS VOICED AND EXEMPLIFIED
FOR OUR PROFESSION
AND
OF MANY TOKENS OF KINDNESS SHOWN
TO THE AUTHOR

"The law has got to be stated over again. And I venture to say that in fifty years we shall have it in a form of which no man could have dreamed fifty years ago."

**Justice *Oliver Wendell Holmes*,
Oration before the Harvard Law School Association,
at Cambridge, 1886.**

PREFACE

The historian Judas Maccabaeus, in a preface of two thousand years ago, has supplied a concise and laudable canon for the task of an abridger. "All these things," he says,¹ "we shall essay to abridge in one volume, with the endeavor to make it attractive to read, convenient to learn, and profitable to use."

The object of the present volume is twofold: to provide the practitioner with a handy summary of the existing rules of Evidence; and at the same time to state them in a scientific form capable of serving as a code.

The practitioner needs a handy summary. He must impress all rules of procedure into his memory, by frequent re-perusal, so as to have the details familiar at call. He must also have at hand a concise manual for ready reference when memory fails. These needs the present book aims to meet.

Many of us were brought up to use Sir James Stephen's Digest in these ways. Its usefulness, however, with the lapse of time and with the expansion of law in the local sovereignties of this country, has been barred by limitation. Moreover, time has also naturally suggested some improved expedients. These expedients have here been tried. They are chiefly two: one of them aims to meet an inherent difficulty of the rules of evidence; the other is suited to the independence of our numerous jurisdictions.

The first expedient is a system of copious cross-references and distinctions. The marked feature of the law of Evidence is that, while the offered fact is single, the potentially applicable rules are multiple. Hence, at the moment when a given rule is applied, the offer is not necessarily disposed of; for other rules may possibly have application to different

¹ II, 2, 25.

PREFACE

aspects of the same offer, and with differing results. The practitioner therefore has to have all of these in mind at that moment. For this purpose the book of rules should at that place and moment supply him with references to other rules, different in essence, but related in some superficial feature to his possible purpose. No compiler can hope, even with such cross-references and distinctions, to meet the needs of every practitioner. But at least some effort can be made to supply the inherent need.

The second expedient is a textual provision for variances of rule in independent jurisdictions. The law is not usually unsettled in a particular State. But the law of another State may be opposed or variant. How can a single textual statement hope to represent correctly the opposed or variant rules of different jurisdictions? It must not pretend to. The effort in this text has been to recognize and to note these variations, so as to warn the user at such points to search elsewhere and more precisely for his own State's law. Textually this has been done by variant phrases and by footnotes: typographically it has been re-enforced by a system of brackets and otherwise. On page xii these typographical expedients are fully explained in a Key.

Of course, to attain further usefulness in this way, the book might provide on alternate blank pages the annotations of all decisions and statutes for each jurisdiction. Thus the practitioner could follow up instantly the textual statement and verify it in the authorities of his own jurisdiction. A series of such Local Editions, completely annotated, is planned for a future time, — at least, in the jurisdictions having voluminous authorities. The blank pages in the present General Edition will serve, it is hoped, for the personal annotations of the careful practitioner who desires to keep up with the course of judicial decision and to preserve his knowledge in accurate and ready form for use at

PREFACE

trials.—Be it said here that an accurate familiarity with the local rules of evidence is to-day lamentably lacking among practitioners who try cases (most notably in metropolitan courts). Few of them try cases often enough to become masters; hence much rough-and-ready bungling, unworthy of our profession and disastrous to any system of procedure. What is needed is a body of expert trial practitioners (like the British barristers), who shall be masters of the rules and shall thus ensure for the rules that perfect working by which alone they can serve the ends of justice.

In its aspect as a Code, the present summary is not offered as a proposal for legislation. Whether a legislative Code is ever desirable, and if it is, whether it is now feasible, in the special conditions of our law and our legal profession—these are large questions, which it would be useless here to enter upon. To Codification, as a general enterprise, many objections may be raised,—and a most deterrent one is that it tends to fossilize the law. There is no thought, in this Summary, of facing this grave question. The aim and hope may properly be (in John Stuart Mill's apt metaphor) "not to drive Reason from the helm, but merely to bind her by articles to steer in a particular way." After all, in its essence, a Code (as we now understand that term) is or ought to be a concise and practicable statement of a body of law in scientific form. The question is whether the law of Evidence can be so stated. The present summary is merely an attempt to answer that question.

The author would be unwilling to put his hand to such a summary unless with the liberty to exemplify therein what seem to him the principles of the science and of scientific statement. It does not here matter what those principles are; the book must speak for itself. But that liberty must include the privilege of formulating the law as it ought to be, alongside of the law as it is. No one could pleasurably

PREFACE

share in giving vogue to a statement of a rule which he believes to be unscientific or impolitic, without noting his dissent; and it is only a short step to formulating a proposal of the rule as it ought to be. Possibly some of these proposals will commend themselves. Possibly also some of them will seem to fall short of an ideal advance. For these latter, Law's inherent slowness of progress is the excuse. When Solon (according to Plutarch), after making over the laws with only "such alterations as might bring the people to acquiesce by persuasion," was asked "whether he had provided the best of laws for the Athenians?" he answered, "Yes, — the best they were capable of receiving." The philosophy of this ancient anecdote stands for us yet as both a consolation and a warning.

The chief textual features, then, in which this summary may plausibly be termed a Code, are that the Rules and Articles are so ordered topically as to form related parts of a complete whole; and that the phrasings are (as far as possible) so constructed grammatically as to represent in the same textual sentence or paragraph the terms of the variant rule, without obliging the reader to formulate its terms for himself and to substitute them in the text. Typographically, it may be added, every device has been used to exemplify the most advanced methods of codified statement, *e. g.*, by expanding and placing on separate lines every clause or phrase which designates an alternative limitation, or represents a doubtful or emphatic feature, or supplies an exception or a modification. The likelihood of a rapid increase of fruits, in the near future, from the labors of the National Conference on Uniform State Laws makes it worth while for our profession to consider carefully the possibilities of attaining clarity of statement and ease of citation by the help of typographical devices.

A closing word about "technicalities," which nowadays

PREFACE

are a subject of reformatory consideration. Evidence ought to have rules knowable before trial; and those rules ought to be fairly precise. That much may easily be conceded by all. But a rule need not be inherently a steel-clad formula. The evil nowadays is that nevertheless we treat it so,—a defect due in part to our traditional attitude towards statutes, and in part to our modern American attitude towards judges. A formulated rule tends unwholesomely to be the judge's tyrannous master, not his ministrant tool. What the system of Evidence needs is, not so much another set of rules, or fewer rules, as a judicial flexibility of rules. This great curative feature can be obtained, and by a few simple though powerful principles. An attempt to formulate them has been made herein, namely, in Rule 5 (Art. 3), Rule 18, and Rule 23. With those proposed principles dominating, in spirit as well as in letter, the curse of technicality, so far as it burdens our system of Evidence, would soon be removed.

But, after all, it is the spirit that gives life to the rules. All the rules in the world will not get us substantial justice if the Judges have not the correct living moral attitude towards substantial justice. We hear much lately about Pragmatism. What ever else it teaches, one truth it assures us plainly, that in the long run a man's concrete beliefs and actions are shaped and selected for him by the controlling power of his underlying disposition. What the law of Evidence, and of Procedure, nowadays most needs is that the men who are our judges shall firmly dispose themselves to get at the truth and the merits of the case before them. Until they become of this disposition and spirit, the mere body of rules, however scientific, however sensible, however apt for justice, will minister to them in vain.

J. H. W.

NORTHWESTERN UNIVERSITY LAW SCHOOL,
CHICAGO, *September 16, 1909.*

KEY TO USE OF THE CODE

- [] The *single bracket* signifies that the rule or part of rule enclosed within it is the law in *one* or more jurisdictions, but *not in all*. A footnote in such cases makes further explanations.

The single bracket is freely used in the text for the purpose of warning the practitioner not to rely on the bracketed phrase without inquiry into the statutes and decisions of his own jurisdiction. The single bracket does not signify anything as to the commendability of the rule or clause so marked.

- [] The *double bracket* signifies that the rule or part of rule enclosed within it is *not yet the law anywhere*, but *ought to be*.

- { } The *brace* signifies that the rule or part of rule enclosed within it is the law in every jurisdiction, but *ought not to be* law.

- § The *section number* at the left margin is intended exclusively as a convenient citation number for a particular passage. It has no relation to the intrinsic subdivision of subjects in the text. The Code is divided into Rules, Articles, Paragraphs, and Clauses — each of these being a subdivision of the larger. The Rules are grouped into Books, Parts, Titles, Sub-titles, Topics, and Sub-topics, and these groups represent the scientific relation of the Rules to each other.

- W. § 496 etc. This citation, at the end of a Rule or Article, represents the number of that *corresponding section*, in the author's Treatise on the System of Evidence, where the authorities are collected for the subject dealt with in the Rule or Article.

The Section (§) numbers in Code and Treatise are not identical; but the sequence of subject is practically identical in Code and Treatise, except for three subjects (Confessions, Admissions by Conduct, and Hypothetical Questions), where a radical transposition has seemed to be a needed improvement.

CONTENTS

INTRODUCTORY PROVISIONS

	PAGE
§ 1 RULE 1. Scope of the Law of Evidence	1
2 RULE 2. Divisions of the Subject	1
3 RULE 3. Facts provable under Rules of Substantive Law and of Pleading; Facta Probanda	1-4
8 RULE 4. Kinds of Proceedings to which these Rules are applicable	4-6
11 RULE 5. Evidence before Trial and after Trial; Jury's Deliberations; Judge's Instructions on Evidence	6-9
17 RULE 6. Conflict of Laws; Rule of the Forum	9-10
21 RULE 7. Conflict of Laws; Federal and State Rules	10
22 ART. 1. State Courts	10-11
23 ART. 2. Federal Courts	11
31 RULE 8. Constitutional Rules; Legislative Alteration	11-12

BOOK I: ADMISSIBILITY

(WHAT FACTS MAY BE PRESENTED AS EVIDENCE)

INTRODUCTORY PROVISIONS:

GENERAL THEORY AND PROCEDURE OF ADMISSIBILITY

TOPIC I: GENERAL THEORY

35 RULE 10. First Axiom of Admissibility	13
36 RULE 11. Second Axiom of Admissibility	13-14

TABLE OF CONTENTS

		PAGE
§ 37	RULE 12. Classification of the Rules of Admissibility	14
38	RULE 13. Admissibility, distinguished from Weight or Proof	14
41	RULE 14. Admissibility, distinguished from Relevancy	14-15
42	RULE 15. Multiple Admissibility	15-16
45	RULE 16. Conditional Admissibility	16
46	RULE 17. Curative Admissibility	16-17
49	RULE 18. Discretion of the Trial Court	17-20

TOPIC II:

PROCEDURE IN QUESTIONS OF ADMISSIBILITY

55	RULE 19. The Offer of Evidence	20
59	ART. 1. Time of the Offer	20
61	ART. 2. Form of the Offer	20-21
65	ART. 3. Tenor of the Offer	21-22
71	RULE 20. The Objection to Evidence	22
72	ART. 1. Time of the Objection	22-24
82	ART. 2. Form of the Objection	24
83	ART. 3. Tenor of the Objection	24-25
90	ART. 4. Waiver of the Objection	25-26
93	ART. 5. Burden of Proof	26
94	RULE 21. The Ruling of the Judge	26-27
97	RULE 22. The Exception to the Ruling	27
98	ART. 1. Time of the Exception	27
99	ART. 2. Form of the Exception	27
100	ART. 3. Tenor of the Exception	27
101	ART. 4. Further Requirements	27
102	RULE 23. New Trial for Erroneous Ruling	27-28

PART I; RELEVANCY

INTRODUCTORY PROVISIONS:

GENERAL PRINCIPLES OF RELEVANCY

105	RULE 24. Kinds of Evidence	29
106	ART. 1. Testimonial Evidence	29-30
109	ART. 2. Circumstantial Evidence	30-31

TABLE OF CONTENTS

§		PAGE
112	ART. 3. Autoptical (Real) Evidence	
115	ART. 4. Relative Weight of Circumstantial and Testimonial Evidence	31 31-33

TITLE I: CIRCUMSTANTIAL EVIDENCE

INTRODUCTORY PROVISIONS: GENERAL PRINCIPLES

118	RULE 25. Degree of Probative Value Required	34
119	ART. 1. Specific Rules Prevail	34
120	ART. 2. Collateral or Remote Evidence	34
121	ART. 3. Conditional Relevancy	35
122	ART. 4. Circumstantial Evidence proved by the Same Kind	35 35
123	RULE 26. Multifariousness, Confusion of Issues, Undue Prejudice, and Unfair Surprise	35-36 35-36
124	RULE 27. Classification of Circumstantial Evidence	36

SUB-TITLE I:

EVIDENCE OF THE DOING OF A HUMAN ACT

TOPIC I: PROSPECTANT EVIDENCE

125	RULE 28. Classification of Prospectant Evidence	37
-----	---	----

SUB-TOPIC A: CHARACTER OR DISPOSITION, AS EVIDENCE OF A HUMAN ACT

1. *Preliminary Discriminations*

126	RULE 29. Character, distinguished from Reputation and from Conduct	37-38 37-38
-----	---	----------------

2. *Character as evidence of an Act*

130	RULE 30. Defendant's Character in a Criminal Case	38
131	ART. 1. Kind of Character	38-39
135	ART. 2. Time and Place of Character	39
136	ART. 3. Defendant's Use of his Character	39
137	ART. 4. Prosecution's Use of Defendant's Character	39-40
138	RULE 31. Character of Complainant in Rape, etc.	40
139	ART. 1. Woman's Good Character	40
140	ART. 2. Prostitution	40
141	RULE 32. Character of Deceased in Homicide	40-41
142	ART. 1. Civil Cases	41

TABLE OF CONTENTS

§			PAGE
143	ART. 2.	Rebuttal	41
144	ART. 3.	Overt Act	41
145	ART. 4.	Communication	41
146	RULE 33.	Character of Parties in Civil Causes	41-42
147	ART. 1.	Sundry Cases involving Moral Traits	42
148	ART. 2.	Negligent Acts	42-43
149	ART. 3.	Plaintiff Defamed	43-44
150	ART. 4.	Defendant in Malpractice	44
151	ART. 5.	Third Persons	44
152	ART. 6.	Animals	44

3. Character as an Issue in the Case

153	RULE 34.	Character in Issue, as Mitigating Damages, as a Substantive Excuse, or otherwise	44-45
154	ART. 1.	Mitigation of Damages	45-46
159	ART. 2.	Excuse	46
163	ART. 3.	Sundry Issues of Character	46-47

SUB-TOPIC B: HUMAN CAPACITY, SKILL, OR MEANS, AS EVIDENCE OF A HUMAN ACT

167	RULE 35.	Human Capacity, Skill, or Means	47
168	ART. 1.	Strength, Skill, Intoxication, Tools, etc.	47
169	ART. 2.	Possession or Lack of Money, as evidencing a Loan, Payment, or the like	48

SUB-TOPIC C: HABIT OR CUSTOM, AS EVIDENCE OF A HUMAN ACT

170	RULE 36.	Habit or Custom	48-49
171	ART. 1.	Sundry Applications	49-50

SUB-TOPIC D: DESIGN OR PLAN, AS EVIDENCE OF A HUMAN ACT

177	RULE 37.	Design or Plan	50-51
178	ART. 1.	Threats of a Defendant	51-52
182	ART. 2.	Threats of the Deceased in Homicide	52
183	ART. 3.	Deceased's Intention of Suicide	52
184	ART. 4.	Testamentary and Contractual Plans	53

SUB-TOPIC E: EMOTION OR MOTIVE, AS EVIDENCE OF A HUMAN ACT

185	RULE 38.	Motive, in general	53
186	ART. 1.	Evidence to prove Motive	53
187	ART. 2.	Evidence of Motive not essential	53

TABLE OF CONTENTS

		PAGE
	TOPIC II: CONCOMITANT EVIDENCE OF A HUMAN ACT (OPPORTUNITY, ALIBI, THIRD PERSON'S GUILT, ETC.)	
	SUB-TOPIC A: OPPORTUNITY	
188	RULE 39. Opportunity, in general; Other Persons' Equal Opportunity	54
189	ART. 1. Exclusive Opportunity, not necessary	54
190	ART. 2. Equal Opportunity for Others	54
191	ART. 3. Other Person's Intercourse with Complainant in Bastardy, Seduction, etc.	54
	SUB-TOPIC B: ESSENTIAL IMPOSSIBILITY	
192	RULE 40. Impossibility of Acts, in general	55
192a	ART. 1. Alibi of Defendant	55-56
193	ART. 2. Non-Access of Husband	56
194	ART. 3. Third Person as Doer of the Act charged	56
195	ART. 4. Suicide	56
	TOPIC III: TRACES OF A HUMAN ACT, AS EVIDENCE OF ITS COMMISSION	
196	RULE 41. Traces, in general	56-57
	SUB-TOPIC A: MECHANICAL TRACES	
197	ART. 1. Miscellaneous Instances	57
198	ART. 2. Brands, Timber-Marks, etc.	57
199	ART. 3. Postmarks	57-58
200	ART. 4. Possession of Chattels taken in a Crime	58
201	ART. 5. Possession of Money	58
202	ART. 6. Possession of Instrument of Debt	58
203	ART. 7. Possession or Existence of a Document, as evidence of Execution, Delivery, or Seisin	59
204	ART. 8. Possession of Property, as evidence of Ownership	59
205	ART. 9. Negative Traces; Death, Payment, Lost Will, etc.	59-60
	SUB-TOPIC B: ORGANIC TRACES	
206	ART. 10. Miscellaneous Instances	60
207	ART. 11. Birth during Marriage, to evidence Paternity	60
208	ART. 12. Birth to Unmarried Mother, to evidence Paternity	60
209	ART. 13. Resemblance of Child, to evidence Paternity	61
210	ART. 14. Corporal Traits, to evidence Race, etc.	61

TABLE OF CONTENTS

		PAGE
	SUB-TOPIC C: MENTAL TRACES	
211	ART. 15. Miscellaneous Instances	61
212	ART. 16. Conduct of Animals, to evidence a Human Act	62
	SUB-TITLE II: EVIDENCE OF A HUMAN QUALITY OR CONDITION	
	TOPIC I:	
	EVIDENCE OF MORAL CHARACTER OR DISPOSITION	
215	RULE 42. Modes of evidencing Character	63
216	ART. 1. Rules not applicable to Witnesses	63
217	ART. 2. Rules of Relevancy and of Auxiliary Policy	63-64
	SUB-TOPIC A: CONDUCT, TO EVIDENCE CHARACTER OF A DEFENDANT IN A CRIMINAL CASE	
218	RULE 43. Particular Instances of Misconduct not admissible	64
219	ART. 1. One Criminal Act not evidential of Another, except through an Inference of Motive, Plan, etc.	64-65
220	ART. 2. Criminal Quality of Act does not Exclude	65
221	ART. 3. Other Criminal Acts, as Inseparable in Proof	65
222	ART. 4. Other Convictions of Crime, to increase Sentence	65-66
223	ART. 5. Other Criminal Acts, to Impeach Defendant as Witness	66
224	RULE 44. Particular Instances of Good Conduct, not admissible	66
	SUB-TOPIC B: CONDUCT, TO EVIDENCE CHARACTER OF OTHER PERSONS EVIDENTIALLY USED	
226	RULE 45. Particular Acts to evidence Character of Deceased in Homicide	66-67
228	RULE 46. Particular Acts to evidence Character of Party or Party's Agent in a Civil Case	67-68
229	RULE 47. Particular Acts to evidence Character of Complainant in Rape, etc.	68-69
230	RULE 48. Conduct to evidence Disposition of an Animal	69
	SUB-TOPIC C: CONDUCT, TO EVIDENCE CHARACTER IN ISSUE	
231	RULE 49. General Rule	69
232	ART. 1. Common Offenders	69-70
233	ART. 2. House of Ill-fame	70

TABLE OF CONTENTS

		PAGE
234	ART. 3. Seduction	70
235	ART. 4. Excuse for Breach of Marriage-Promise	70
236	ART. 5. Justification of Defamation of Character	70
237	ART. 6. Incompetence of Physician	70-71
238	ART. 7. Incompetence of Employee	71
239	ART. 8. Mitigation of Damages (Defamation, Malicious Prosecution, etc.)	71-72

TOPIC II:

EVIDENCE OF PHYSICAL CONDITION OR CAPACITY

240	RULE 50. Particular Instances of Conduct	72
241	ART. 1. Strength, Illness, etc.	72
242	ART. 2. Skill or Mechanical Means	72-73
243	ART. 3. Pecuniary Capacity	73
244	RULE 51. Physical Appearance	73
245	ART. 1. Age	73
246	ART. 2. Health, Strength, etc.	73
247	RULE 52. Predisposing Circumstances	73
248	ART. 1. Heredity	74
249	ART. 2. Occupation	74
250	RULE 53. Prior or Subsequent Condition	74

TOPIC III: EVIDENCE OF MENTAL CAPACITY

251	RULE 54. General Principle	74
252	RULE 55. Conduct, Utterances, and Appearances	74-75
253	ART. 1. Suicide	75
254	ART. 2. Testamentary Plans	75
255	ART. 3. Disinheritance	75
256	ART. 4. Delusion	75
257	ART. 5. Third Persons' Communications	75
258	ART. 6. Explanations	75
259	ART. 7. Undue Influence	75
260	ART. 8. Hearsay Rule	75
261	RULE 56. Predisposing Circumstances	75-76
262	ART. 1. Miscellaneous Occurrences	76
263	ART. 2. Heredity	76
264	RULE 57. Prior and Subsequent Condition	76
265	RULE 58. Intoxication	76-77

TABLE OF CONTENTS

§		PAGE
	TOPIC IV: EVIDENCE OF DESIGN OR PLAN	
266	RULE 59. General Principle	77
267	ART. 1. Miscellaneous Instances	77
268	ART. 2. Explanatory Circumstances	77
269	ART. 3. Similar Offences	78
270	ART. 4. Prior or Subsequent Design	78
	TOPIC V: EVIDENCE OF INTENT	
271	RULE 60. General Principle	78
272	ART. 1. Motive, Knowledge, Design, distinguished	78
273	ART. 2. Sundry Evidence	78-79
274	ART. 3. Similar Offences	79
275	ART. 4. Hearsay Rule	79
	TOPIC VI:	
	EVIDENCE OF KNOWLEDGE, BELIEF, OR CONSCIOUSNESS	
276	RULE 61. General Principle	79
	SUB-TOPIC A: EXTERNAL CIRCUMSTANCES, AS EVIDENCE OF KNOWLEDGE, BELIEF, OR CONSCIOUSNESS	
277	RULE 62. General Principle	79-80
278	ART. 1. Defendant in Homicide: Deceased's Re- puted Character	80
279	ART. 2. Same: Deceased's Threats	81
280	ART. 3. Same: Deceased's Violent Acts	81
281	ART. 4. Employer of Incompetent Employee: Re- puted Character of the Employee	81
282	ART. 5. Same: Acts of the Employee	82
283	ART. 6. Owner of Vicious Animal	82
284	ART. 7. Owner of Defective Premises or Chattels	82
285	ART. 8. Person dealing with an Insolvent, Intem- perate, or Lunatic	83
286	ART. 9. Sundry Persons dealing with Property	83
287	ART. 10. Person dealing with a Partnership	83
288	ART. 11. Person Prosecuting or Arresting without Probable Cause	83
289	ART. 12. Possessor of a Document	83-84
	SUB-TOPIC B: CONDUCT OR UTTERANCES, AS EVIDENCE OF KNOWLEDGE, BELIEF, OR CONSCIOUSNESS	
290	RULE 63. General Principle	84
291	ART. 1. Belief <i>per se</i> material	84
292	ART. 2. Belief otherwise relevant	84-85
293	ART. 3. Exceptions (Marriage, Legitimacy, etc.)	85-86
294	ART. 4. Consciousness of Innocence	86

TABLE OF CONTENTS

§		PAGE
	SUB-TOPIC C: PRIOR OR SUBSEQUENT KNOWLEDGE, ETC.	

295	RULE 64. General Principle	87
-----	--------------------------------------	----

TOPIC VII:

SIMILAR OFFENCES OR OTHER ACTS, AS EVIDENCE OF KNOWLEDGE, DESIGN, OR INTENT

297	RULE 65. General Principle	87
298	ART. 1. Knowledge	87-88
299	ART. 2. Intent	88
300	ART. 3. Design or Plan	88-89
301	ART. 4. Application of the Rule to Sundry Crimes, Torts, and Frauds	89-90
315	ART. 5. Application of the Rule to Contracts and other Civil Cases	90-91

TOPIC VIII:

SIMILAR ACTS, AS EVIDENCE OF HABIT, SYSTEM, USAGE, CUSTOM, OR STATUS

316	RULE 66. Habit or System	92
317	ART. 1. Contracts	92-93
318	ART. 2. Prescriptive Possession	93
319	ART. 3. Trade Custom or Usage	93-94
320	ART. 4. Prior or Subsequent Habit, Custom, or Status	94
321	ART. 5. Habit of Handwriting or Spelling	94

TOPIC IX: EVIDENCE TO PROVE EMOTION (MOTIVE, FEELING, PASSION)

322	RULE 67. General Principle	94
324	ART. 1. A: Circumstances Tending to Excite an Emotion	95
325	ART. 2. Criminality does not exclude	95
326	ART. 3. Motive in Civil Cases; Pecuniary Motive	95-96
327	ART. 4. B: Conduct Exhibiting an Emotion	96
328	ART. 5. C: Prior and Subsequent Emotion	96
329	ART. 6. Hostility; Sexual Emotion	96-97
331	ART. 7. Malice, in Defamation	97

TOPIC X: EVIDENCE TO PROVE IDENTITY

333	RULE 68. Definition	97-98
334	ART. 1. General Principle	98

TABLE OF CONTENTS

		PAGE
335	ART. 2. Criminality of Act immaterial	98
336	ART. 3. Hearsay	98

SUB-TITLE III: EVIDENCE TO PROVE FACTS OF EXTERNAL INANIMATE NATURE

337	RULE 69. Definition and Classification	99
-----	--	----

TOPIC I: IDENTITY

338	RULE 70. General Principle	99
-----	--------------------------------------	----

TOPIC II: OCCURRENCE OF AN EVENT

339	RULE 71. General Principle	99
-----	--------------------------------------	----

TOPIC III: EXISTENCE OR PERSISTENCE IN TIME

340	RULE 72. General Principle	100
341	ART. 1. Existence, from Prior or Subsequent Exist- ence	100
342	ART. 2. Whole, evidenced by its Parts	100

TOPIC IV:

TENDENCY, CAPACITY, QUALITY, CAUSE, OR EFFECT

344	RULE 73. General Principle	101
345	ART. 1. Details of the Rule	101-102
349	ART. 2. Limitations of Policy	102-103
350	ART. 3. Applications of the Rule to Material Effects as evidence	103-104
352	ART. 4. Applications of the Rule to Corporal Effects as evidence	104
354	ART. 5. Applications of the Rule to Mental Effects as evidence	104-105

TITLE II: TESTIMONIAL EVIDENCE

360	RULE 74. Classification of Testimonial Evidence	106
-----	---	-----

SUB-TITLE I: TESTIMONIAL QUALIFICATIONS

INTRODUCTORY RULES

362	RULE 75. Time of Qualifications	107
363	RULE 76. Burden of Proof of Qualifications	107

TABLE OF CONTENTS

		PAGE
364	RULE 77. Mode of Proof of Qualifications . . .	107
365	RULE 78. Time of Objecting to Qualifications . . .	107-108
366	RULE 79. Who determines Qualifications . . .	108

TOPIC I: ORGANIC CAPACITY

SUB-TOPIC A: MENTAL DERANGEMENT (INSANITY, IDIOCY, DISEASE, INTOXICATION)

367	RULE 80. General Principle	108
368	ART. 1. Trial Court determines	108
369	ART. 2. Capacity presumed	108

SUB-TOPIC B: MENTAL IMMATURITY (INFANCY)

370	RULE 81. General Principle	108-109
371	ART. 1. Trial Court determines	109
372	ART. 2. Capacity presumed	109

SUB-TOPIC C: MORAL DEPRAVITY

373	RULE 82. General Principle	109
374	ART. 1. Alienage, Race, Color, Sex, Religion	109
375	ART. 2. Conviction of Crime	110
376	ART. 3. Self-confessed Mendacity	110

TOPIC II: EXPERIENTIAL QUALIFICATIONS

377	RULE 83. General Principle	111
379	ART. 1. General and Special Experience	111
380	ART. 2. Qualifications presumed	111
381	ART. 3. Who is qualified as Expert	111-112
382	ART. 4. Rules for Specific Subjects (Law, Medicine, etc.)	112-113

TOPIC III: EMOTIONAL CAPACITY

SUB-TOPIC A: PECUNIARY INTEREST

388	RULE 84. General Principle	114
389	ART. 1. Criminal Cases	114
390	ART. 2. Civil Cases; Survivors	114
392	ART. 3. Testifying to Intent	114-115
393	ART. 4. Mode of proving disqualification	115

TABLE OF CONTENTS

§

SUB-TOPIC B: DOMESTIC RELATIONSHIP

PAGE

395	RULE 85. General Principle	115
396	ART. 1. Husband and Wife	115
397	ART. 2. Survivor's Spouse	115-116

TOPIC IV: TESTIMONIAL KNOWLEDGE

400	RULE 86. General Principle	117
401	ART. 1. Knowledge not presumed	117
402	ART. 2. Means of Knowledge specified	117
403	ART. 3. Knowledge need not be Positive	117
404	ART. 4. Data must be Rational	117-118
405	ART. 5. Personal Observation required	118-119
413	ART. 6. Negative Knowledge	119
414	ART. 7. Hypothetical Forms of Knowledge	119
415	RULE 87. Knowledge on Specific Subjects	119
416	ART. 1. Sanity	119-120
417	ART. 2. Reputation	120
418	ART. 3. Handwriting	120-121
422	ART. 4. Value	121

TOPIC V: TESTIMONIAL RECOLLECTION

427	RULE 88. General Principle	123
429	ART. 1. Specifying the Grounds of Recollection	123
430	ART. 2. Past and Present Recollection	123-124
431	RULE 89. Past Recollection Recorded	124
432	ART. 1. Recollection fresh when recorded	124
433	ART. 2. Accuracy of Record	124-125
436	ART. 3. Original and Copy	125
438	ART. 4. Joint Testimony of Observer and Re- corder	125
440	ART. 5. Opponent's Inspection	125
441	ART. 6. Record forms Part of Testimony	125-126
442	ART. 7. Present Recollection not Preferred	126
443	ART. 8. Past Unrecorded Recollection	126
444	RULE 90. Present Recollection Refreshed	126
446	ART. 1. Writing not made by Witness	127
447	ART. 2. Not an Original	127
448	ART. 3. Not made at the Time	127
449	ART. 4. Opponent's Inspection	127
450	ART. 5. Writing not a Part of Testimony	127
451	ART. 6. Refreshing on Cross-Examination	127

TABLE OF CONTENTS

PAGE

TOPIC VI:

TESTIMONIAL NARRATION (COMMUNICATION)

454	RULE 91. General Principle	128
455	ART. 1. General Rules to prevent Improper Sug- gestion in Sundry Ways	128
456	ART. 2. Specific Rules affecting the Form of Testi- mony	129

SUB-TOPIC A: TESTIMONIAL INTERROGATION

461	RULE 92. General Principle	129
462	ART. 1. Leading Questions	129
467	ART. 2. Misleading Questions on Cross-Examination	130-131
468	ART. 3. Intimidating Questions on Cross-Examina- tion	131
469	ART. 4. Repetition of Questions	131-132
473	ART. 5. Length of Examination; Number of Ex- aminers	132
474	ART. 6. Questions by the Judge	132
475	ART. 7. Narration without Questions; Non-respon- sive Answers	132

SUB-TOPIC B: NON-VERBAL TESTIMONY

478	RULE 93. General Principle	132-133
479	ART. 1. Dramatic Communication	133
480	ART. 2. Pictorial Communication	133

SUB-TOPIC C: WRITTEN TESTIMONY

488	RULE 94. General Principle	134
489	ART. 1. Exceptions	134
490	ART. 2. Rules for Depositions	134-135

SUB-TOPIC D: INTERPRETED TESTIMONY

496	RULE 95. General Principle	136
497	ART. 1. Interpreters and Translators	136

SUB-TITLE II: TESTIMONIAL IMPEACHMENT

TOPIC I: GENERAL RULES

500	RULE 96. General Principle of Impeachment	137
	RULE 97. Persons Impeachable	137
501	ART. 1. Hearsay Witness	137-138
502	ART. 2. Defendant as Witness	138

TABLE OF CONTENTS

§		PAGE
503	ART. 3. Impeachment of Impeaching Witness	138
504	ART. 4. Impeaching One's Own Witness	138-139
509	ART. 5. Who is One's Own Witness	139-140

TOPIC II: CHARACTER, MENTAL DEFECTIVENESS, BIAS, ETC., AS GENERAL TRAITS IN IMPEACHMENT

518	RULE 98. Moral Character	141
519	ART. 1. Kind of Trait	141
521	ART. 2. Time of Character	141
522	ART. 3. Place of Character	142
523	RULE 99. Insanity, Intoxication, and Sundry Mental Defects	142
524	ART. 1. Insanity	142
525	ART. 2. Intoxication	142
526	ART. 3. Disease, etc.	142
527	ART. 4. Degrees of Mental Accuracy	142
528	ART. 5. Theological Belief; Race	143
529	RULE 100. Inexpertness, Bias, Interest	143

TOPIC III: EVIDENCING GENERAL QUALITIES BY CONDUCT AND CIRCUMSTANCES

532	RULE 101. Extrinsic Testimony and Cross-Examination	144
533	ART. 1. Scope of Cross-Examination	144
534	ART. 2. Demeanor on the Stand	144
535	RULE 102. Bias	144
536	ART. 1. Circumstances indicating Bias	145
537	ART. 2. Conduct and Language	145
540	RULE 103. Corruption	145
541	ART. 1. Willingness to lie	145
542	ART. 2. Subornation	146
544	ART. 3. Sundry Corruption	146
545	ART. 4. Prior Inquiry	146
546	RULE 104. Interest	146-147
549	RULE 105. Moral Character	147
550	ART. 1. Extrinsic Testimony	147
552	ART. 2. Cross-examination	147-148
557	ART. 3. Rumors of Misconduct, to test a Reputation-Witness	148
558	RULE 106. Skill, Observation, Memory, etc.	148-149
559	ART. 1. Extrinsic Testimony	149

TABLE OF CONTENTS

§		PAGE
561	ART. 2. Cross-examination and Tests in Court	149-150
565	ART. 3. Collateral Contradiction	151

TOPIC IV: CONTRADICTION AND SELF-CONTRADICTION

567	RULE 107. Contradiction (Specific Error)	151
568	ART. 1. Collateral Matters defined	151
572	ART. 2. Direct and Cross-examination	152
573	ART. 3. Falsus in uno	152
574	RULE 108. Self-Contradiction	152
575	ART. 1. Collateral Facts defined	152-153
578	ART. 2. Cross-examination	153
579	ART. 3. Preliminary Warning	153-154
586	ART. 4. Self-Contradiction defined	154-155
589	ART. 5. Self-Contradictory Statement not Testi- mony	155
591	ART. 6. Explaining the Inconsistency	155

SUB-TITLE III: TESTIMONIAL REHABILITATION (SUPPORTING OR RESTORING A WITNESS' CREDIT)

595	RULE 109. General Principle	156
-----	---------------------------------------	-----

TOPIC I:

REHABILITATION AFTER IMPEACHMENT, IN GENERAL

596	RULE 110. Introducing Good Moral Character	156-157
603	RULE 111. Other Methods involving Moral Character.	157
604	ART. 1. Discrediting the Impeaching Witness	157
606	ART. 2. Denying or Explaining Bad Repute	157
608	ART. 3. Denying or Explaining Particular Miscon- duct	157-158
611	RULE 112. After Impeachment by Bias, Interest, etc.	158

TOPIC II:

REHABILITATION BY PRIOR CONSISTENT STATEMENTS

612	RULE 113. Witnesses in general	158
613	ART. 1. Statements admissible after Impeachment	158-159
621	RULE 114. Special Classes of Witnesses	159
622	ART. 1. Rape Complainant	159
626	ART. 2. Bastardy Complainant	159
627	ART. 3. Owner's Complaint after Theft	159
628	ART. 4. Accused's Exculpations	160

TABLE OF CONTENTS

§

PAGE

SUB-TITLE IV: PARTIES' ADMISSIONS

TOPIC I: GENERAL PRINCIPLES

630	RULE 115.	Definition	162
631	RULE 116.	Limitations not applicable	162
631	ART. 1.	Hearsay Exceptions	162
633	ART. 2.	Witness' Self-Contradiction	162-163
634	ART. 3.	Witness' Qualifications	163
635	ART. 4.	Not Conclusive (Estoppels, Solemn Admissions, Explanations, Corroboration)	163
640	RULE 117.	Limitations applicable	163-164

TOPIC II: IMPLIED ADMISSIONS

641	RULE 118.	Sundry Implied Admissions	164
642	ART. 1.	Offer to Compromise	164-165
647	ART. 2.	Measures of Prevention or Remedy	165-166
650	ART. 3.	Personal Demeanor, in Evasion of an Arrest, Charge, or Suit	166
654	ART. 4.	Fabrication and Suppression of Evidence	167
657	ART. 5.	Failure to Sue, Claim, Prosecute, or Defend	167
658	ART. 6.	Failure to Produce Evidence	168-169
664	ART. 7.	Explanations	169
665	ART. 8.	Accused's Innocent Conduct	169
666	RULE 119.	Admissions by Implied Assent to a Third Person's Statement	169
667	ART. 1.	Statements by a Person Referred to	169
668	ART. 2.	Statements in a Party's Presence	169-170
670	ART. 3.	Statements in Judicial Proceedings	170
671	ART. 4.	Writings in Possession	170
672	ART. 5.	Writings Used	170-171

TOPIC III: ADMISSIONS IN PLEADINGS

680	RULE 120.	General Principle	171
681	ART. 1.	Common-law Pleadings in the Same Cause	171
682	ART. 2.	Chancery Pleadings in Other Causes	172
683	ART. 3.	Common-law Pleadings in Other Causes	172
684	ART. 4.	Superseded or Amended Pleadings	172

TOPIC IV: ADMISSIONS BY CO-PARTIES, AGENTS AND PRIVIES IN INTEREST

685	RULE 121.	General Principle	172-173
686	ART. 1.	Nominal, Representative, and Joint Parties	173

TABLE OF CONTENTS

		PAGE
687	ART. 2. Privies in Obligation (Promisor, Agent, Attorney, etc.)	173
688	ART. 3. Privies in Title: 1. Co-existent Interests (Co-obligee, Co-Legatee, etc.)	173-174
691	ART. 4. Same: 2. Successive Interests, depending on Death or Act of Law	174
692	ART. 5. Same: 3. Successive Interests, depending on Grant, Sale, or Indorsement	174-176

TOPIC V: ACCUSED'S CONFESSIONS

700	RULE 122. General Principle	176
701	ART. 1. Definition of Confession	176-177
702	ART. 2. Nature of the Inducement, in general	177
706	ART. 3. Person in Authority	177
707	ART. 4. Specific Threats and Promises	177
715	ART. 5. Mental Incapacity	177
716	ART. 6. Confessions during Legal Proceedings	177-179
721	ART. 7. Terminating the Inducement	179
722	ART. 8. Confirmation by Discovered Facts	179
723	ART. 9. Burden of Proof	179-180
724	ART. 10. Judge and Jury	180

TITLE III: AUTOPTIC PREFERENCE (REAL EVIDENCE)

730	RULE 123. General Principle	181-182
731	ART. 1. Unfair Prejudice	182
732	ART. 2. Indecency, Impropriety, Inconvenience	182
734	ART. 3. View by Jury	182-183
740	ART. 4. View by Expert	183

PART II: RULES OF AUXILIARY PROBATIVE POLICY

745	RULE 125. Definition and Classification	184
746	ART. 1. Best Evidence Rule	184

TITLE I: PREFERENTIAL RULES

SUB-TITLE I: PRODUCTION OF DOCUMENTARY ORIGINALS

747	RULE 126. General Principle	185
748	ART. 1. "(A). <i>In proving a writing;</i> " Rule not applicable to Chattels	185

TABLE OF CONTENTS

		PAGE
751	ART. 2. " <i>(B). Production must be Made;</i> " Rules concerning Production	185-186
754	ART. 3. " <i>(C). Unless it is not feasible;</i> " General Principle	186-187
759	ART. 4. Same: (1) Loss or Destruction	187-188
764	ART. 5. Same: (2) Detention by Opponent	188-189
774	ART. 6. Same: (3) Detention by Third Person	189-190
777	ART. 7. Same: (4) Physical Irremovability	190
778	ART. 8. Same: (5) Judicial Records	190
779	ART. 9. Same: (6) Sundry Official Documents	190
780	ART. 10. Same: (7) Private Books of Public Importance	190-191
781	ART. 11. Same: (8) Recorded Conveyances	191
782	ART. 12. Same: (9) Voluminous Documents	191-192
783	ART. 13. " <i>(D). Of the original writing itself.</i> " What is the original	192
784	ART. 14. Same: (1) Duplicates and Counterparts	192-193
790	ART. 15. Same: (2) Copy Acted on or Dealt with as Original	193
791	ART. 16. Same: (3) Copy made Original by Substantive Law	193
792	ART. 17. Same: (4) Exclusive Memorials under the Parol Evidence Rule	193-194
793	ART. 18. " <i>(E). Whenever the purpose is to establish its terms;</i> " General Principle	194
794	ART. 19. Same: Applications of the Principle	194-197
805	RULE 127. Exceptions to the Rule	197
806	ART. 1. Documents Collateral to the Issue	197
807	ART. 2. Documents evidenced by Party's Admission of Contents	197-198
811	ART. 3. Documents affecting a Witness on Voir Dire	199
812	ART. 4. Documents admitted by a Witness on Cross-Examination	199-200
820	RULE 128. Kinds of Secondary Evidence of Contents	200
821	ART. 1. Circumstantial Evidence	200-201
822	ART. 2. Testimonial Evidence (Copy; Recollection)	201
823	ART. 3. Same: Personal Knowledge of Witness	201
824	ART. 4. Same: Verifying Copy by Calling Witness	201-202
825	ART. 5. Rules of Preference: (1) No absolute Exclusion of Recollection-Testimony	202
826	ART. 6. Same: (2) Copy Preferred to Recollection-Testimony	202-203
831	ART. 7. Same: (3) Certified and Sworn Copies	203
832	ART. 8. Same: (4) Copy of a Copy	203-204

SUB-TITLE II: TESTIMONIAL PREFERENCES

850	RULE 129. Definition and General Principle	205
-----	--	-----

TABLE OF CONTENTS

PAGE

TOPIC I: CONDITIONAL PREFERENCES

851	RULE 130.	Attesting-Witness to Documents; General Principle	205-206
852	ART. 1.	"(a) Where the execution of any document is required to have been made in the presence of another person"	206
853	ART. 2.	"(b) Who subscribes it for the purpose of attesting its execution"	206
854	ART. 3.	"(c) A party desiring to prove its execution"	206
856	ART. 4.	"(d) Against an opponent entitled in the state of the issues to dispute execution"	206-207
862	ART. 5.	"(e) Must before producing other evidence"	207-208
866	ART. 6.	"(f) Either produce the attester as witness"	208
867	ART. 7.	"(g) In such numbers as are required by law for attestation"	208
869	ART. 8.	"(h) Or show his or their testimony to be unavailable"	209-210
883	ART. 9.	"(i) And also authenticate the attestation, unless that is not feasible"	210-211
887	ART. 10.	"(j) As well as authenticate the party's signature"	211
890	RULE 131.	Reports of Prior Testimony	211-212
891	ART. 1.	Magistrate's Report of Accused's Statements	212
892	ART. 2.	Magistrate's Report of Witness' Testimony	212
893	ART. 3.	Other Persons' Reports of Testimony	212
894	ART. 4.	Depositions	212
895	RULE 132.	Sundry Preferred Witnesses	213
896	ART. 1.	Official Records and Certificates	213
897	ART. 2.	Eye-Witnesses; Sundry Witnesses	213-214

TOPIC II: ABSOLUTE PREFERENCES

900	RULE 133	General Principle	214
901	ART. 1.	Nature of an Absolute Preference	214-215
902	ART. 2.	Magistrate's Report of Testimony	215
903	ART. 3.	Enrolled Copy of Legislative Act	215
904	ART. 4.	Certificate of Election	215
905	ART. 5.	Sundry Instances	216
906	ART. 6.	Constitutionality of Statutes	216-217

TITLE II: ANALYTIC RULES (HEARSAY RULE)

SUB-TITLE I: HEARSAY RULE IN GENERAL

910	RULE 134.	General Principle	218-219
-----	-----------	-------------------	---------

TABLE OF CONTENTS

		PAGE
911	ART. 1. Cross-examination essential, but not Confrontation	219
912	ART. 2. Hearsay Extra-Judicial Assertions	219-220

TOPIC I:

THE RIGHT TO AN OPPORTUNITY OF CROSS-EXAMINATION OF THE OPPONENT'S WITNESS

913	RULE 135. General Principle	220
914	ART. 1. Kind of Tribunal or Officer; Notice	220-221
919	ART. 2. Issues and Parties	221-222
922	ART. 3. Procedure of the Examination	222-223

TOPIC II: THE RIGHT TO CONFRONTATION OF THE OPPONENT'S WITNESS

928	RULE 136. General Principle	223
929	ART. 1. Confrontation dispensable where not feasible	223-224
930	ART. 2. Conditions permitting it to be dispensed with	224-225
940	ART. 3. Proof of foregoing Conditions	225
942	ART. 4. Rule not applicable	225-226
945	ART. 5. Exceptions to the Rule	226

SUB-TITLE II: EXCEPTIONS TO THE HEARSAY RULE

950	RULE 137. General Principle	227-228
951	RULE 138. Dying Declarations	228
952	ART. 1. Scope of the Issue	228
953	ART. 2. Subject of the Statement	228
954	ART. 3. Mental Condition of the Declarant	228-229
957	ART. 4. Testimonial Qualifications, etc.	229
961	ART. 5. Other Rules of Evidence Applicable	229-230
964	ART. 6. Judge and Jury	230
966	RULE 139. Statements of Facts against Interest	230
967	ART. 1. Necessity for Using (Death, Absence, etc.)	230
968	ART. 2. Nature of the Interest diserved	231
973	ART. 3. Measure of Interest, etc.	231-232
976	ART. 4. Sundry Rules applicable	232
980	RULE 140. Statements about Family History (Pedigree)	233
981	ART. 1. Necessity for Using (Death, etc.)	234
983	ART. 2. Absence of Bias or Interest	234

TABLE OF CONTENTS

		PAGE
984	ART. 3. Testimonial Qualifications of the Declarant	234-235
992	ART. 4. Form of the Statement	235-236
995	ART. 5. Subject of the Statement	236
996	ART. 6. Kind of Litigation	236
997	ART. 7. Other Rules applicable	237
1000	RULE 141. Attestation of a Subscribing Witness	237
1002	RULE 142. Regular Entries in general	237-238
1003	ART. 1. Necessity of Using (Death, etc.)	238
1005	ART. 2. Circumstances and Form of the Entry (Regularity, etc.)	238-239
1012	ART. 3. Personal Knowledge of the Entrant; Com- posite Entries	239-240
1015	ART. 4. Production of Original Entries; Ledger	240
1018	RULE 143. Regular Entries in Parties' Books	240-241
1019	ART. 1. No Clerk	241
1020	ART. 2. Subject of Entry; Cash Transactions	241-242
1022	ART. 3. Kind of Occupation	242
1023	ART. 4. Kind of Book; Regularity, Contempo- raneousness, Honest Appearance	242
1026	ART. 5. Reputation of Entrant	242
1027	ART. 6. Form of Entry	242
1028	ART. 7. Personal Knowledge of Entrant; Com- posite Entries	243
1032	ART. 8. Production of Original Entry; Ledger	243
1035	RULE 144. Statements about Private Boundaries	243
1036	ART. 1. Declarant Unavailable	243
1037	ART. 2. Declarant Disinterested	244
1037	ART. 2a. Declarant in Possession and on the Land	244
1038	ART. 3. Declarant's Knowledge	244
1039	ART. 4. Forms of the Statement	244
1040	RULE 145. Ancient Deed-Recitals	244
1041	ART. 1. Deed must be Ancient	245
1042	ART. 2. Corroboration by Possession	245
1043	ART. 3. Subject of the Recital	245
1045	RULE 146. Statements of Deceased Persons in general	245-246
1050	RULE 147. Reputation	246
1052	ART. 1. Reputation of Land-Boundaries and Land, Customs	246-248
1062	ART. 2. Reputation of Events of General History	248
1066	ART. 3. Reputation of Marriage and Other Facts of Family History	248-249
1071	ART. 4. Reputation of Moral Character	249-251
1084	ART. 5. Reputation of Other Personal Facts	251

TABLE OF CONTENTS

§			PAGE
1090	RULE 148.	Official Statements in General	252
1091	ART. 1.	Officer need not be accounted for	252
1092	ART. 2.	Nature of the Duty; Kinds of Officers	252-253
1097	ART. 3.	Officer's Personal Knowledge	253
1098	ART. 4.	Classes of Documents	253-254
1100	RULE 148a.	Registers and Records	254
1101	ART. 1.	Assessors' Record	254
1102	ART. 2.	Ship's Log-book	254
1103	ART. 3.	Register of Marriage, Birth, and Death	254-255
1107	ART. 4.	Register of Ships	256
1110	ART. 5.	Register of Conveyances	256-257
1117	ART. 6.	Register of Assignment of Patent	257
1118	ART. 7.	Register of Wills	257
1119	ART. 8.	Register of Government Land-Office	257-258
1120	ART. 9.	Judicial Records	258
1121	ART. 10.	Corporate Records	258-259
1124	ART. 11.	Legislative Records	259
1130	RULE 148b.	Returns and Reports	259
1131	ART. 1.	Sheriff's Returns and Recitals	260
1133	ART. 2.	Surveyor's Return (Map, etc.)	260
1134	ART. 3.	Report of Testimony	260-261
1140	ART. 4.	Inquisition of Lunacy	261
1141	ART. 5.	Coroner's Verdict	261
1142	ART. 6.	Census and other Statistical Reports	261
1145	RULE 148c.	Certificates	261-263
1146	ART. 1.	Notary's Certificate for Commercial Paper	263
1147	ART. 2.	Certificate of Execution of Deeds	263-264
1149	ART. 3.	Certificate of Oath	264
1150	ART. 4.	Certificate of Marriage, etc.	264
1151	ART. 5.	Postmark	264
1152	ART. 6.	Certified Copy in general	264-266
1160	ART. 7.	Certified Copy of Judicial Record	266
1161	ART. 8.	Certified Copy of Recorded Deed	266
1163	ART. 9.	Certified Copy of Private Record	266-267
1164	ART. 10.	Officially Printed Copy	267
1170	RULE 149.	Scientific Treatises	267-268
1171	ART. 1.	Indorsement by Expert Witness	268
1172	ART. 2.	Subject of the Evidence	268
1177	ART. 3.	Use of Treatises by Counsel	269
1180	RULE 150.	Commercial and Professional Lists, Regis- ters, and Reports	269
1181	ART. 1.	Reports of Judicial Decisions and Copies of Statutes	269
1182	ART. 2.	Price-Lists and Market-Reports	270
1183	ART. 3.	Abstracts of Title	270

TABLE OF CONTENTS

§		PAGE
1186	RULE 151. Affidavits	270-271
1187	ART. 1. Sundry Exceptions	271
1192	ART. 2. Facts not Disputed, etc.	271
1193	ART. 3. Judicial Discretion; Right of Cross-examination	271
1195	RULE 152. Voter's Statements	272
1196	ART. 1. Qualifications; Domicil	272
1197	ART. 2. Tenor of Vote	272
1198	ART. 3. Intent of Vote	272
1200	RULE 153. Statements of Physical Sensation or Mental Condition	272-273
1201	ART. 1. Statements of Physical Sensation	273-274
1207	ART. 2. Statements of Design, Intent, Motive, Feeling, etc.	274-275
1213	ART. 3. Statements by an Accused	275-276
1218	ART. 4. Statements by a Testator	276-277
1230	RULE 154. Spontaneous Exclamations	278
1232	ART. 1. Nature of Occurrence	278
1233	ART. 2. Time of Occurrence	278-279
1235	ART. 3. Subject of Utterance	279
1236	ART. 4. Personal Knowledge; Bystander	279
1237	ART. 5. Complaint of Rape or Robbery	279-280

SUB-TITLE III:

HEARSAY RULE NOT APPLICABLE

1240	RULE 155. General Principle	281
1242	ART. 1. Utterances forming a Part of the Issue	281-282
1245	ART. 2. Utterances forming a Verbal Part of an Act (Payment, Possession, etc.)	282-285
1258	ART. 3. Utterances used as Circumstantial Evidence	285-286
1260	ART. 4. Utterances used by way of Completeness	286

SUB-TITLE IV:

HEARSAY RULE AS APPLICABLE TO COURT OFFICERS

1265	RULE 156. General Principle	287
1266	ART. 1. Juror	287-288
1270	ART. 2. Judge	288
1271	ART. 3. Counsel	288-289
1280	ART. 4. Interpreter	289-290

TABLE OF CONTENTS

§

PAGE

TITLE III: PROPHYLACTIC (OR, PRECAUTIONARY) RULES SUB-TITLE I: OATH AND AFFIRMATION

1285	RULE 157.	General Principle	291
1286	ART. 1.	Nature of the Oath	291
1287	ART. 2.	Capacity to take Oath	291-292
1292	ART. 3.	Mode of Ascertaining Capacity	292
1295	ART. 4.	Form of taking Oath	292-293
1300	ART. 5.	Opponent's Waiver of the Oath	293
1302	ART. 6.	Witness' Exemption from Oath	293-294
1305	ART. 7.	Affirmation as a Requirement	294
1306	ART. 8.	Form of Affirmation	294

SUB-TITLE II: PERJURY - PENALTY

1310	RULE 158.	General Principle	295
1311	ART. 1.	No Rule of Exclusion	295

SUB-TITLE III: PUBLICITY

1312	RULE 159.	General Principle	295
------	-----------	-----------------------------	-----

SUB-TITLE IV: SEQUESTRATION OF WITNESSES

1314	RULE 160.	General Principle	296
1315	ART. 1.	Demandable as of Right	296
1316	ART. 2.	Procedure	296-297
1318	ART. 3.	Persons included in the Order	297
1321	ART. 4.	Disqualification for Disobedience	297

SUB-TITLE V: DISCOVERY OF EVIDENCE TO THE OPPONENT BEFORE TRIAL

1325	RULE 161.	General Principle	298
1326	ART. 1.	Circumstantial Evidence	298-299
1327	ART. 2.	Testimonial Evidence in Criminal Cases	299-301
1332	ART. 3.	Testimonial Evidence in Civil Cases	301
1335	ART. 4.	Documents	301-302
1339	ART. 5.	Premises and Chattels	302-303
1341	ART. 6.	Application of these Rules to Third Persons	303-304
1344	ART. 7.	Application of these Rules to Criminal Cases	304
1345	ART. 8.	Inspection of Documents at Trial	304

TABLE OF CONTENTS

PAGE

TITLE IV: SIMPLIFICATIVE RULES

SUB-TITLE I:

ORDER OF INTRODUCING EVIDENCE

1350	RULE 162.	General Principle	305
1351	ART. 1.	Waiver	305

TOPIC A:

ORDER OF EVIDENCE IN STAGES OF THE WHOLE CASE

1352	RULE 163.	General Principle	306
1353	ART. 1.	Specific Rules Applicable to Either Party	306-307
1360	ART. 2.	Same: Conditional Relevancy	307-308
1361	ART. 3.	Proponent's Case in Chief	308
1362	ART. 4.	Opponent's Case in Reply	308
1365	ART. 5.	Proponent's Case in Rebuttal	309
1366	ART. 6.	Opponent's Case in Rejoinder, and Subse- quent Stages	309
1367	ART. 7.	Case Closed, Argument Begun, etc.	309

TOPIC B: ORDER OF EVIDENCE IN THE EXAMINATION OF AN INDIVIDUAL WITNESS

1369	RULE 164.	General Principle	309-310
1372	ART. 1.	Rules applicable to Specific Topics	310-311
1373	ART. 2.	Rules applicable to Stages in general	311
1375	ART. 3.	Direct Examination	311
1376	ART. 4.	Cross-Examination	311-313
1379	ART. 5.	Re-Direct and Re-Cross Examination	313
1381	ART. 6.	Recall	313

SUB-TITLE II:

RULES TO AVOID EXCESSIVE CONFUSION OF ISSUES OR UNDUE PREJUDICE

TOPIC A: CIRCUMSTANTIAL EVIDENCE

1383	RULE 165.	General Principle of avoiding Excessive Confusion of Issues	314
1384	ART. 1.	Operation with Other Principles	314
1385	ART. 2.	Trial Court's Determination	314
1386	ART. 3.	Specific Applications of the Rule	314-315
1390	RULE 166.	General Principle of avoiding Undue Preju- dice	315
1391	ART. 1.	Operation with Other Principles	315
1392	ART. 2.	Trial Court's Determination	316
1393	ART. 3.	Specific Applications of the Rule	316

TABLE OF CONTENTS

§

PAGE

TOPIC B: TESTIMONIAL EVIDENCE

1400	RULE 167.	General Principle of avoiding Undue Prejudice	316
1401	ART. 1.	Witnesses merely Cumulative in Number	316-317
1404	ART. 2.	Judge as Witness	317-318
1405	ART. 3.	Juror as Witness	318
1406	ART. 4.	Counsel or Attorney as Witness	318

SUB-TITLE III: OPINION TESTIMONY

TOPIC A: OPINION, IN GENERAL

1410	RULE 168.	General Principle	319
1411	ART. 1.	Rule applied to a Lay Witness	319-320
1413	ART. 2.	Rule applied to an Expert Witness	320-322
1416	ART. 3.	Hypothetical Questions	322-324
1424	RULE 168a.	General Principle	324

TOPIC B:

OPINION RULE APPLIED TO SPECIFIC TOPICS OF TESTIMONY

1430	RULE 169.	Sanity	325
1431	ART. 1.	Knowledge	325
1432	ART. 2.	Prior Specification of Data	325
1433	ART. 3.	Attesting Witness	325
1434	ART. 4.	Opinion limited to Specific Acts	325-326
1435	RULE 170.	Value	326
1436	ART. 1.	Land	326
1437	ART. 2.	Personalty	326
1438	ART. 3.	Services, Tort-Damage, Contractual Non-performance	326
1440	RULE 171.	Insurance Risk	326
1441	ART. 1.	Actual Risk	326-327
1442	ART. 2.	Classified Risk	327
1443	ART. 3.	Known Risk	327
1445	RULE 172.	Quality of a Thing or of Human Conduct as to Reasonableness, Care, Duty, Safety, or the Like	327
1446	RULE 173.	Law	328
1447	ART. 1.	Foreign Law	328
1450	ART. 2.	Trade Usage	328
1451	ART. 3.	Interpretation of Documents	328-329
1454	ART. 4.	Accused's or Testator's Capacity	329
1455	ART. 5.	Sundries	329

TABLE OF CONTENTS

§			PAGE
1457	RULE 174.	State of Mind (Intention, Feeling, Knowledge, Meaning, Understanding, etc.)	329
1458	ART. 1.	State of Mind, in general	329-330
1459	ART. 2.	Meaning of an Utterance	330-331
	RULE 175.	Sundry Topics	331
1461	ART. 1.	Corporal Appearance of Things and Persons	331
1462	ART. 2.	Medical, Surgical, and Pathological Appearances	331-332
1463	ART. 3.	Probability and Possibility, Cause and Effect, Capacity and Tendency	332
1464	ART. 4.	Distance, Time, Speed, Size, Weight, Direction, Form, Identity, etc.	332
1468	RULE 176.	Moral Character and Professional Skill	332
1469	ART. 1.	Moral Character (Accused, Deceased, Rape Complainant, etc.)	332-333
1470	ART. 2.	Character for Care, Competence, or Skill	333
1471	ART. 3.	Character of a Witness	333
1475	RULE 177.	Handwriting	333-334
1476	ART. 1.	Lay Witness having Personal Knowledge	334
1479	ART. 2.	Lay Witness not having Personal Knowledge	334
1480	ART. 3.	Expert Witness	334-336
1487	ART. 4.	Testing the Witness on Cross-Examination	336-337
1488	ART. 5.	Exhibiting Specimens to the Jury	337
1491	ART. 6.	Expert Testimony to Ink, Spelling, Imitations, etc.	337

TITLE V: QUANTITATIVE (OR, SYNTHETIC) RULES

SUB-TITLE I: NUMBER OF WITNESSES REQUIRED

1500	RULE 178.	General Principle	338
1502	RULE 179.	Rules of Number for Specific Issues	338
1503	ART. 1.	Treason	338
1504	ART. 2.	Perjury	339
1506	ART. 3.	Sundry Crimes	339
1507	ART. 4.	Chancery Bills	339
1508	ART. 5.	Wills	339-340
1514	ART. 6.	Sundry Civil Cases	340
1516	RULE 180.	Rules of Number for Specific Kinds of Witnesses	341
1517	ART. 1.	Accomplice	341
1520	ART. 2.	Woman Complainant	341

TABLE OF CONTENTS

§		PAGE
1521	ART. 3. Illegitimate's Mother	341-342
1522	ART. 4. Surviving Claimant	342
1523	ART. 5. Sundry Kinds of Witnesses	342
1526	ART. 6. Parties in Divorce	342
1530	ART. 7. Accused in Criminal Case	343

SUB-TITLE II: KINDS OF WITNESSES RE- QUIRED FOR SPECIFIC ISSUES

1534	RULE 181. General Principle	344
1535	ART. 1. Eye-Witness in a Criminal Case	344
1536	ART. 2. Eye-Witness of Corpus Delicti	344-345
1537	ART. 3. Eye-Witness or Certificate of Marriage	345-346
1544	ART. 4. Owner of Goods in Larceny	346
1545	ART. 5. Written Admission of a Sale	346

SUB-TITLE III: VERBAL COMPLETENESS

1547	RULE 182. General Principle	347
------	---------------------------------------	-----

TOPIC A: COMPULSORY COMPLETENESS

1548	RULE 183. Oral Utterances	347
1549	ART. 1. Verbal Precision	348
1553	ART. 2. Entirety of Parts	349
1559	ART. 3. Parts may be Rejected	349
1561	RULE 184. Documents	349-350
1562	ART. 1. Document produced in Court	350
1566	ART. 2. Document lost or destroyed	350-351
1568	ART. 3. Public Record	351

TOPIC B: OPTIONAL COMPLETENESS

1575	RULE 185. General Principle	352
1576	ART. 1. Parts of Same Utterance admitted	352-353
1580	ART. 2. Separate Utterance excluded	353

TOPIC C: COMPOSITE RULES

1583	RULE 186. Party's Answer to Interrogatories of Dis- covery	353
1584	ART. 1. Chancery Answer	353-354
1587	ART. 2. Statutory Interrogatories	354
1589	RULE 187. Inspection of Opponent's Document, to admit the Whole	354

TABLE OF CONTENTS

SUB-TITLE IV: AUTHENTICATION OF DOCUMENTS PAGE

TOPIC A: AUTHENTICATION IN GENERAL

1591	RULE 188.	General Principle	355
1592	ART. 1.	Chattels, etc.	355
1593	ART. 2.	Brands on Animals and Logs	356
1594	ART. 3.	Telephone Message	356

TOPIC B: AUTHENTICATION OF DOCUMENTS

1595	RULE 189.	Authentication of Documents	357
1596	ART. 1.	Kinds of Evidence	357
1597	ART. 2.	Authentication, when Unnecessary	358-359
1603	ART. 3.	Order of Evidence of Authenticity, Loss, and Contents	359
1604	ART. 4.	Rules of Sufficiency and of Presumption	359
1605	ART. 5.	Other Rules for Documents, distinguished	359

TOPIC C:

SPECIFIC RULES OF SUFFICIENCY FOR AUTHENTICATION OF DOCUMENTS BY CIRCUMSTANTIAL EVIDENCE

1608	RULE 190.	Authentication by Age of Document	360
1609	ART. 1.	Age	360
1611	ART. 2.	Custody	360
1612	ART. 3.	Appearance	360
1613	ART. 4.	Possession of Property described	360-361
1614	ART. 5.	Original and Copy; Recorded Deeds	361
1617	ART. 6.	Authority to Execute	361
1618	ART. 7.	Kinds of Documents	362
1620	RULE 191.	Authentication by Contents of Document	362
1621	ART. 1.	Printed Matter	362-363
1624	ART. 2.	Postmark	363
1625	ART. 3.	Reply-Letter	363
1626	ART. 4.	Reply-Telegram	363
1627	ART. 5.	Identity of Name	363
1630	RULE 192.	Authentication by Official Custody	363-364
1631	ART. 1.	Witnesses to Custody	364
1633	RULE 193.	Authentication by Official Seal or Signature	364
1634	ART. 1.	Hearsay Exception and Judicial Notice, distinguished	364-366
1638	ART. 2.	Seal of State	366
1639	ART. 3.	Seal of Court	366
1640	ART. 4.	Seal of Notary	366

TABLE OF CONTENTS

§	ART.	Description	PAGE
1641	ART. 5.	Seal of Sundry Officers	366
1642	ART. 6.	Official Signatures	367
1643	ART. 7.	Seal of a Corporation	367

PART III: RULES OF EXTRINSIC POLICY

1650	RULE 194.	Definition and Classification	368
------	-----------	---	-----

TITLE I: RULES OF ABSOLUTE EXCLUSION

1652	RULE 195.	Evidence involving Public Indecency	368
1654	RULE 196.	Evidence involving Public Inconvenience	368-369
1656	RULE 197.	Evidence involving Illegality	369

TITLE II: RULES OF OPTIONAL EXCLUSION (PRIVILEGE)

SUB-TITLE I: TESTIMONIAL DUTY AND PRIVILEGE IN GENERAL

1660	RULE 198.	General Principle	370
1661	ART. 1.	Scope of Duty as to Attendance and Dis- closure	370
1662	ART. 2.	Scope of Duty as to Documents, Chattels, etc.	370
1663	ART. 3.	Process to Enforce Duty; Subpoena	370-371
1670	ART. 4.	Constitutional Right to Process	371
1671	ART. 5.	Officers having Power to compel, etc.	371
1672	ART. 6.	Kinds of Privilege	371-372
1673	ART. 7.	Privilege Personal to Witness	372
1676	ART. 8.	Privilege may be waived	372

SUB-TITLE II: VIATORIAL PRIVILEGE

1680	RULE 199.	Indemnity for Attendance	373
1685	RULE 200.	Ability to Attend	373-374
1686	ART. 1.	Illness	374
1687	ART. 2.	Personal Status	374
1689	ART. 3.	Inconvenience	374-375

TABLE OF CONTENTS

§

SUB-TITLE III: TESTIMONIAL PRIVILEGE

PAGE

TOPIC A: PRIVILEGED TOPICS

1693	RULE 201.	Sundry Privileged Topics	375
1694	ART. 1.	Irrelevant Matters	375
1695	ART. 2.	Documents of Title	375
1696	ART. 3.	Trade Secrets	375-376
1698	ART. 4.	Official Secrets	376
1699	ART. 5.	Theological Belief	376
1700	ART. 6.	Political Vote	376
1701	ART. 7.	Disgrace or Infamy	376
1702	ART. 8.	Party-Opponent in Civil Suit	376-378
1707	ART. 9.	Civil Liability	378
1710	RULE 202.	Anti-Marital Facts	378
1711	ART. 1.	Valid Subsisting Marriage	378
1713	ART. 2.	Form of Testimony	378-379
1715	ART. 3.	Subject of Testimony	379
1718	ART. 4.	Issues	379-380
1724	ART. 5.	Waiver of Privilege	380
1726	ART. 6.	Inference from Claim of Privilege	381
1730	RULE 203.	Self-Criminating Facts	381
1731	ART. 1.	Proceedings and Persons	381
1732	ART. 2.	Kinds of Facts protected	381-382
1737	ART. 3.	Form of Disclosure protected	383
1740	ART. 4.	Mode of Claiming the Privilege	384
1746	ART. 5.	Effect of Claiming the Privilege	384-385
1749	ART. 6.	Waiver of the Privilege	385-387
1753	ART. 7.	Expurgation of Criminality, by Pardon, Legislative Immunity, or otherwise	387

TOPIC B: PRIVILEGED COMMUNICATIONS

1760	RULE 204.	General Principle	388
1761	ART. 1.	Privileges limited in Number	388
1762	ART. 2.	Confidential Communications in general not privileged	388
1763	ART. 3.	Telegrams	388-389
1765	RULE 205.	Attorney-and-Client Communications	389
1766	ART. 1.	"(1) Where legal advice of any kind is sought"	389-391
1773	ART. 2.	"(2) From a professional legal adviser in his capacity as such"	391-392
1779	ART. 3.	"(3) The communications"	392-394
1786	ART. 4.	"(4) Relating to that purpose"	394
1787	ART. 5.	"(5) Made in confidence"	394-396
1796	ART. 6.	"(6) By the client"	396-397

TABLE OF CONTENTS

§			PAGE
1798	ART. 7.	" (7) Are at his instance permanently protected "	397-398
1803	ART. 8.	" (8) From disclosure by himself or by the legal adviser "	398
1805	ART. 9.	" (9) Except the protection be waived "	398-399
1812	RULE 206.	Husband-and-Wife Communications . . .	399
1813	ART. 1.	" (1) A confidential communication by one spouse to the other " . . .	399-400
1818	ART. 2.	" (2) Is protected permanently from disclosure by either " . . .	400-401
1822	ART. 3.	" (3) Except the protection be waived "	401-402
1825	RULE 207.	Petit Jurors' Communications . . .	402
1826	ART. 1.	Whose is the Privilege . . .	402
1827	ART. 2.	Third Persons Overhearing . . .	402
1828	ART. 3.	Exception for Setting Aside or Correcting the Verdict . . .	402
1830	RULE 208.	Grand Jurors' Communications . . .	403
1831	ART. 1.	Whose is the Privilege . . .	403
1832	ART. 2.	Exception for Testimony of Witness and for Quashing Indictments . . .	403
1833	RULE 209.	Witnesses and Informers' Communications to Grand Juries and Public Prosecutors . .	403
1834	ART. 1.	Testimony before Grand Jurors . . .	404
1837	ART. 2.	Information to Public Prosecutor . . .	404-405
1842	RULE 210.	State Secrets and Official Communications . . .	405
1843	ART. 1.	Whose is the Privilege . . .	405
1845	ART. 2.	Scope of the Privilege . . .	405-406
1848	ART. 3.	Privilege not applicable to Published Matters . . .	406
1849	ART. 4.	Privilege not applicable in lieu of Exemption from Civil or Criminal Liability . . .	406
1850	ART. 5.	Other Principles distinguished . . .	407
1855	RULE 211.	Patient-and-Physician Communications . . .	407
1856	ART. 1.	Confidentiality . . .	407
1857	ART. 2.	Professional Consultation . . .	407
1858	ART. 3.	Necessary Information only . . .	407-408
1859	ART. 4.	Information . . .	408
1860	ART. 5.	Exceptions for Crimes and Torts . . .	408
1861	ART. 6.	Whose is the Privilege . . .	408
1864	ART. 7.	Waiver . . .	408-409
1870	RULE 212.	Penitent-and-Priest Communications . . .	409

TABLE OF CONTENTS

§

PART IV: PAROL EVIDENCE RULE (LEGAL ACTS)

PAGE

1871	RULE 213.	General Principle	410
1872	ART. 1.	Nature of Legal Acts in general	410
1873	ART. 2.	Subdivisions in the Constitution of Legal Acts	411
1874	ART. 3.	Writings and Legal Acts	411

TITLE I: CREATION, OR ENACTION, OF LEGAL ACTS

1877	RULE 214.	General Principle	412
1878	ART. 1.	Subject must be Legal	412-413
1882	ART. 2.	Terms must be definite	413
1883	ART. 3.	Expression must be Final	413-414
1888	ART. 4.	Same: Delivery	414-415
1895	ART. 5.	Intent and Mistake, in general	415
1896	ART. 6.	Intent as to Subject	415-316
1897	ART. 7.	Intent as to Terms	416-419
1908	ART. 8.	Intent as to Delivery	419
1911	ART. 9.	Unilateral Acts; Intent as to Wills	419-420
1913	ART. 10.	Voidable Acts	420

TITLE II: INTEGRATION OF LEGAL ACTS

1915	RULE 215.	General Principle	421
1916	ART. 1.	Varieties of Integration	421
1917	RULE 216.	Voluntary Integration of Unilateral Acts	421
1920	RULE 217.	Voluntary Integration of Bilateral Acts	422
1921	ART. 1.	Mutual Intent as to the Specific Act	422-423
1926	ART. 2.	Application of the Rule to Specific Kinds of Documents	423-425
1936	ART. 3.	Fraud	425
1937	ART. 4.	Usage of Trade or Locality	425-426
1938	ART. 5.	Subsequent Agreements; Novation, Altera- tion, and Waiver	426
1939	ART. 6.	Effect Limited to Parties	426-427
1941	ART. 7.	Burden of Proof	427
1944	RULE 218.	Compulsory Integration of Private Parties' Acts	428
1945	ART. 1.	Kinds of Documents	428
1946	RULE 219.	Compulsory Integration of Public Officers' Acts	428
1947	ART. 1.	Kinds of Documents	428-429

TABLE OF CONTENTS

§	TITLE III: SOLEMNIZATION OF LEGAL ACTS	PAGE
---	---	-------------

1950	RULE 220. General Principle	430
------	---------------------------------------	-----

TITLE IV: INTERPRETATION OF LEGAL ACTS

1953	RULE 221. General Principle	431
1954	ART. 1. Stages of Interpretation	431
1955	ART. 2. "Meaning," "Intention," "Sense," "Volition"	431-432

SUB-TITLE I: STANDARD OF INTERPRETATION

1958	RULE 222. General Principles	432-433
1961	ART. 1. Rule as to Disturbing a Plain Meaning	433-434
1962	ART. 2. Special Usage	434-435
1966	ART. 3. Mutual Usage	435
1970	ART. 4. Personal Usage	435-436
1973	ART. 5. Specific Rules for Specific Words	437

SUB-TITLE II: SOURCES OF INTERPRETATION

1975	RULE 223. General Principle	437
1976	ART. 1. Statements of Intent, excluded	437-439
1978	ART. 2. Same: Exception for Equivocation, or Latent Ambiguity	439
1981	ART. 3. Same: Exception for Misdescription	439-440
1982	ART. 4. Same: Exception for Rebutting a Presumption	440
1983	ART. 5. Misdescription, in general	440-441

BOOK II:

BURDEN OF PROOF AND PRESUMPTIONS

(BY WHOM EVIDENCE MAY OR MUST BE
PRESENTED)

TITLE I: GENERAL PRINCIPLES

1990	RULE 224. Judge or Parties may adduce Evidence	442
1991	ART. 1. Judge may summon Expert Witnesses	442-443
1994	RULE 225. Parties' Burden of Proof; General Principle	443
1995	ART. 1. Difference in Legal Effect of the Two Burdens	443-444

TABLE OF CONTENTS

§			PAGE
1997	RULE 226.	Duty of Passing the Judge	444-445
1998	ART. 1.	Primary Incidence of Duty	445
1999	ART. 2.	Modes of Satisfying Duty; Sufficiency and Decisiveness	445-446
2002	ART. 3.	General Test for Sufficiency and Decisiveness by Ruling on the Case	447
2004	ART. 4.	Specific Rules for Sufficiency by Rule of Law	447
2005	ART. 5.	Specific Rules of Law for Presumptions	448
2006	ART. 6.	Assuming Credibility of Testimony in Rulings upon Sufficiency or Decisiveness	448-449
2009	ART. 7.	Form and Effect of Ruling upon Sufficiency or Decisiveness	449-452
2015	ART. 8.	Time of Motion for Ruling of Sufficiency or Decisiveness	452-453
2022	RULE 227.	Risk of Jury-Doubt; Measure of Persuasion for Jury, and Rules of Risk for Parties	453
2023	ART. 1.	Measure of Persuasion in Criminal Cases	453-454
2027	ART. 2.	Measure of Persuasion in Civil Cases	454-455
2032	ART. 3.	Rules of Risk for Parties	455

TITLE II:

PRESUMPTIONS AND BURDENS IN SPECIFIC ISSUES

2034	RULE 228.	Rules for Specific Issues	456-457
2036	ART. 1.	General Tests for Risk or Duty	457-458
2041	ART. 2.	Sanity in Civil Cases	458
2045	ART. 3.	Sanity in Criminal Cases	459
2046	ART. 4.	Undue Influence or Fraud in Wills	459
2047	ART. 5.	Undue Influence or Fraud by Beneficiary Grantees	459
2048	ART. 6.	Conveyances Fraudulent against Creditors	459
2055	ART. 7.	Marriage Consent	459-460
2059	ART. 8.	Marriage Capacity	460
2060	ART. 9.	Negligence Contributory by a Plaintiff	460
2061	ART. 10.	Negligence of Bailee	461
2062	ART. 11.	Negligence in Defective Machines and Apparatus	461
2063	ART. 12.	Cause of Death	461-462
2064	ART. 13.	Criminal Intent	462
2065	ART. 14.	Criminal Capacity	462-463
2066	ART. 15.	Criminal Acts	463
2067	ART. 16.	Ownership, from Possession	463-464
2068	ART. 17.	Payment	464

TABLE OF CONTENTS

§			PAGE
2069	ART. 18.	Documents; Execution, Delivery, Revocation, Spoliation, Alteration	464-465
2080	ART. 19.	Legitimacy	465-466
2081	ART. 20.	Chastity	466
2082	ART. 21.	Identity of Person	466
2083	ART. 22.	Continuity of Ownership, Possession, Residence, etc.	466
2084	ART. 23.	Continuity of Life; Death; Survivorship	466-467
2087	ART. 24.	Seaworthiness	467
2088	ART. 25.	Performance of Official Duty; Regularity of Proceedings	468
2089	ART. 26.	Title to Public Office	468
2090	ART. 27.	Incorporation	468
2091	ART. 28.	Foreign Law	468-469
2093	ART. 29.	Contracts	469
2094	ART. 30.	Statute of Limitations	469
2095	ART. 31.	Malicious Prosecution	469-470

BOOK III:

LAW AND FACT; JUDGE AND JURY

(TO WHOM EVIDENCE MAY OR MUST BE PRESENTED)

2100	RULE 229.	General Principle	471
2101	ART. 1.	Facts preliminary to Admissibility of Evidence	471-472
2104	ART. 2.	Negligence	472-473
2107	ART. 3.	Reasonableness	473
2110	ART. 4.	Documents	473-474
2113	ART. 5.	Criminal Intent	474-475
2115	ART. 6.	Law	475

BOOK IV:

OF WHAT PROPOSITIONS NO EVIDENCE NEED BE PRESENTED

TITLE I: JUDICIAL NOTICE

2120	RULE 230.	General Principles	476-478
2130	ART. 1.	Classes of Facts authorized to be Noticed	478-479
2131	ART. 2.	Domestic Law	479-480
2132	ART. 3.	Foreign Law	480
2133	ART. 4.	Political Organization and Action	480-481
2134	ART. 5.	Courts and Judicial Proceedings	481-482

TABLE OF CONTENTS

§			PAGE
2135	ART. 6.	Notorious Matters of Commerce, Industry, History, Language, Science, etc.	482
2136	ART. 7.	Mixed Matters, presumably not Dis- putable	482

TITLE II: JUDICIAL ADMISSIONS

(WAIVER BY STIPULATION)

2140	RULE 231.	General Principle	483
2141	ART. 1.	Effect as Conclusive of Controversy	483-484
2148	ART. 2.	Form and Authority	484-485

1. TABULAR ANALYSIS OF THE CODE

BOOK I. ADMISSIBILITY OF EVIDENCE.

THEORY AND PROCEDURE.

INTRODUCTORY:

- I. RULES OF RELEVANCY.**
- II. RULES OF AUXILIARY PROBATIVE POLICY.**
- III. RULES OF EXTRINSIC POLICY.**
- IV. PAROL EVIDENCE RULES.**

[See Table 2, for further analysis.]

BOOK II. BY WHOM EVIDENCE IS PRESENTED.

- I. BURDEN OF PROOF, AND PRESUMPTIONS;
GENERAL PRINCIPLES.**
- II. BURDENS AND PRESUMPTIONS IN
SPECIFIC ISSUES.**

BOOK III. TO WHOM EVIDENCE IS PRESENTED.

- I. JUDGE.**
- II. JURY.**

BOOK IV. PROPOSITIONS NEEDING NO EVIDENCE.

- I. JUDICIAL NOTICE.**
- II. JUDICIAL ADMISSIONS.**

2. TABULAR ANALYSIS OF BOOK I (ADMISSIBILITY)

PART I. RULES OF RELEVANCY

<u>I. Circumstantial Evidence</u>	<u>II. Testimonial Evidence</u>
<ul style="list-style-type: none"> I. of Human Act II. of Human Quality, etc. III. of Inanimate Fact <p>[See Table 3]</p>	<ul style="list-style-type: none"> I. Qualifications II. Impeachment III. Rehabilitation IV. Admissions <p>[See Table 4]</p>

III. Autoptic Proference

PART II. RULES OF AUXILIARY PROBATIVE POLICY

<u>I. Preferential</u>	<u>II. Analytic</u>	<u>III. Prophylactic</u>
<ul style="list-style-type: none"> I. Documentary Originals II. Attesting Witness, etc. 	<p>Hearsay</p> <ul style="list-style-type: none"> 1. Cross-Examination 2. Confrontation 	<ul style="list-style-type: none"> I. Oath II. Penalty III. Publicity IV. Sequestration V. Discovery
<u>IV. Simplificative</u>	<u>V. Quantitative</u>	
<ul style="list-style-type: none"> I. Order of Evidence II. Sundries III. Opinion 	<ul style="list-style-type: none"> I. No. of Witnesses II. Kind of Witness III. Verbal Completeness IV. Authentication 	

PART III. RULES OF EXTRINSIC POLICY

<u>I. Absolute Exclusion</u>	<u>II. Optional Exclusion (Privilege)</u>	
I. Testimonial Duty	II. Privileges of Non-Attendance	III. Privileges of Silence
<u>A. Topics</u>	<u>B. Communications</u>	
<ul style="list-style-type: none"> 1. Sundry 2. Anti-Marital 3. Self-Criminating 	<ul style="list-style-type: none"> 1. Sundries 2. Attorney 3. Marital 4. Jurors 	<ul style="list-style-type: none"> 5. Informers; Officials 6. Physician 7. Priest

PART IV. PAROL EVIDENCE RULES

I. Enaction	II. Integration	III. Formalities	IV. Interpretation
-------------	-----------------	------------------	--------------------

8. TABULAR ANALYSIS OF BOOK I, PART I, TITLE I

CIRCUMSTANTIAL EVIDENCE

I. EVIDENCING A HUMAN ACT

- I. Prospectant Evidence
- { A. Moral Character
 - { B. Capacity, Skill, etc.
 - { C. Habit, Custom
 - { D. Design, Plan
 - { E. Emotion, Motive

II. Concomitant Evidence

- { A. Opportunity
- { B. Impossibility

III. Retrospectant Evidence

- { A. Traces Mechanical
- { B. Traces Organic
- { C. Traces Mental

II. EVIDENCING A HUMAN QUALITY, ETC.

Facts to be Proved

- { I. Moral Character
- { II. Physical Capacity
- { III. Mental Capacity
- { IV. Design, Plan
- { V. Intent
- { VI. Knowledge, Belief
- { VII. Habit, Custom
- { VIII. Emotion, Motive
- { IX. Identity

May be evidenced by

- { Conduct exhibiting
- { Circumstances causing
- { Prior or subsequent condition
- { [Repute ; see Hearsay Rule]
- { [Personal Opinion; see Opinion Rule]

III. EVIDENCING A FACT OF INANIMATE NATURE

Facts to be proved

- { I. Identity
- { II. Occurrence
- { III. Existence, Persistence
- { IV. Tendency, Quality, Cause, Effect

May be evidenced by

- { Similar Instances
- { Sundries

4. TABULAR ANALYSIS OF BOOK I, PART I, TITLE II

TESTIMONIAL EVIDENCE

I. TESTIMONIAL QUALIFICATIONS II. TESTIMONIAL IMPEACHMENT

General Capacity	I. Organic Capacity { A. Mental Derangement { B. Mental Immaturity { C. Moral Depravity II. Experiential Capacity { A. General Experience { B. Special Experience III. Partisan Capacity { A. Pecuniary Interest { B. Marital Relationship	I. Persons Impeachable { A. Defendant { B. Own Witness II. Impeaching Traits { A. Moral Character { B. Mental Incapacity { C. Inexpertness { D. Bias, Interest, etc. III. Evidencing the Impeaching Traits { A. Bias, Corruption, Interest { B. Moral Character { C. Inexpertness, Memory, etc.
	IV. Observation { A. Knowledge in general { B. Specific Knowledge V. Recollection { A. Past (Recorded) { B. Present (Refreshed) VI. Narration { A. Interrogated { B. Dramatic, Pictorial { C. Written { D. Interpreted	{ C. Inexpertness, Memory, etc. <i>evidenced by</i> { Conduct exhibiting { Circumstances causing { [Repute; see Hearsay Rule] { [Personal Opinion; see Opinion Rule] <i>introduced through</i> { Extrinsic Testimony { Cross-Examination IV. Contradiction and Self-Contradiction <i>introduced by</i> { Extrinsic Testimony { Cross-Examination

III. TESTIMONIAL REHABILITATION IV. PARTIES' ADMISSIONS

**POCKET
CODE OF EVIDENCE**

CODE OF EVIDENCE

INTRODUCTORY RULES

RULE 1. *Scope of the Law of Evidence.* The law of Evidence, as herein contained, includes the rules applicable when any knowable fact or group of facts is offered before a legal tribunal for the purpose of producing a persuasion, positive or negative, on the part of the tribunal, as to the truth of a proposition, not of law or of logic, on which the determination of the tribunal is to be given. — (W. § 1.)

RULE 2. *Divisions of the Subject.* The rules of Evidence are comprised under five heads, herein represented by Introductory Rules and four Books, divided as follows:

Book I: What facts may be presented as Evidence (*Admissibility*).

Book II: By whom must or may Evidence be presented (*Burden of Proof; Presumptions*).

Book III: To whom must or may Evidence be presented (*Judge and Jury; Law and Fact*).

Book IV: Of what propositions in issue no Evidence need be presented (*Judicial Notice; Judicial Admissions*). — (W. § 3.)

RULE 3. *Facts Material and Provable under Rules of Substantive law and of Pleading.* The law of Evidence, as herein contained, therefore does not include the rules of substantive law or of pleading; these define the issues in litigation, and are assumed to have been already applied for determining the *facta probanda* (or propositions material to be proved).

These *facta probanda* are of the following four sorts: — (W. § 2.)

ART. 1. *Rules of Substantive law.* Propositions of fact 4 are provable by evidence when by the particular *substantive law* of the case they are material to the right or duty, claim or defence, involved therein.

Illustrations. (1) In a prosecution for battery the defendant offers to evidence the fact that the party beaten by him had insulted him shortly beforehand; this is admitted or excluded, not by any rule of evidence, but by the law of battery which determines whether the fact of the insult is a justification or a mitigation.

(2) In a prosecution for burglary, the prosecution offers to show that persons were living in the building at the time; this fact is admitted or excluded, not by a rule of evidence, but by the law defining the crime of burglary as a breaking and entering of a certain kind of house.

Distinctions : A rule of evidence and a rule of substantive law may here apply with different results to the same or to similar facts, according to the purpose with which the fact is offered.

(a) In an action for defamation by publishing a charge of crime, the plaintiff may offer his good character, by a rule of evidence, as evidential of his innocence of the crime, the defendant having pleaded the truth of the charge — (W. § 66); yet the plaintiff's bad reputation, by a rule of the law of damages, may or may not be used in mitigation of damages, if the defendant has pleaded both the general issue and the truth of the charge. — (W. §§ 70-73.)

(b) In a prosecution for murder, with a plea of self-defence, the deceased's reputed character for violence is not in issue under the substantive law; but it may be received, by a rule of evidence, to show the deceased's aggression or the defendant's belief. — (W. §§ 63, 246.)

(c) In an action based on the negligent manner of constructing a switch-frog, the custom of construction by other railroads may not in substantive law make the legal standard of care; but by a rule of evidence it may be received to show the mode of a careful construction. — (W. § 461.)

ART. 2. *Rules of Pleading.* Propositions of fact are provable 5 by evidence when by the *terms of the pleadings* and under the *rules of pleading* they are issuable in the case at bar.



Illustrations. In an action on a promissory note, the fact of payment may or may not be evidenced by the plaintiff's admissions, according as the payment is in issue or not, under a plea of general issue.

Distinctions: A rule of evidence and a rule of pleading may here apply with different results to the same or similar facts, according to the purpose with which the fact is offered:

(a) The defendant's offer to pay money in settlement may by a rule of evidence not be received to show an admission of liability; but by a rule of pleading his payment of money into court may restrict the issues in the case. — (W. § 1061.)

(b) In a trial on amended pleadings, the original unamended pleading does not control the issues in the trial; but by a rule of evidence it may be used as an extra-judicial admission. — (W. § 1067.)

ART. 3. Rules dispensing from Evidence. Propositions of 6 fact are provable by evidence when by any *rule of procedure*, including a rule of evidence, such facts are effective to dispense a party from evidencing a proposition which otherwise would require to be evidenced.

Illustrations. Where the execution of a deed is material, and the party needing it relies upon a stipulation or other judicial admission of its due execution, the stipulation may be proved. — (W. §§ 2588-2596.)

Cross-reference: This dispensation from evidencing propositions in issue is usually obtained by *judicial notice* (W. §§ 2565-2582) or by *judicial admissions* which appear on the record and therefore do not need to be evidenced.

ART. 4. Rules of Evidence. Propositions of fact are 7 provable by evidence when by any *rule of evidence* they are themselves admissible as evidentiary facts and thus in their turn become propositions to be proved.

Illustrations. In a prosecution for murder, the defendant's preparation or plan to commit the murder is admissible as evidence that he did commit it; this preparation or plan then is itself a fact to be proved, and the defendant's sharpening of a knife or utterance of a threat may be admissible as evidence thereof (W. §§ 238, 1725); and so on in innumerable instances forming the bulk of the material in every trial.

ART. 5. Material, admissible, relevant. A fact provable 7a under any of the foregoing Articles 1-4 is said to be *material*,



i. e., legally capable of being proved. A fact receivable as evidence of such provable fact is said to be *admissible*. A *relevant* fact is one which would be admissible so far as concerns the rules of logic and probative value, i. e., the rules of Part I in Book I, but may not be actually admissible by reason of the restrictive rules in Parts II-IV of Book I.

Illustration. In an action against a carrier on a bill of lading, the signature of the shipper to the bill of lading and his prior reading of it may be material under Arts. 1-3, *supra*. If so, his letter admitting that he had read it, and his signature to the letter, may be relevant, under the rules of Part I, Book I, *post*; but they may not be admissible, by reason of some of the rules in Parts II, III, Book I, *post*.

RULE 4. *Kinds of Proceedings in which these Rules are applicable.*

ART. 1. The rules of Evidence, as herein contained, do
8 not apply in the following kinds of proceedings, except as otherwise expressly provided:

Par. (a). In *ex parte* proceedings, as distinguished from reponsory or adversary proceedings. — (W. § 4.)

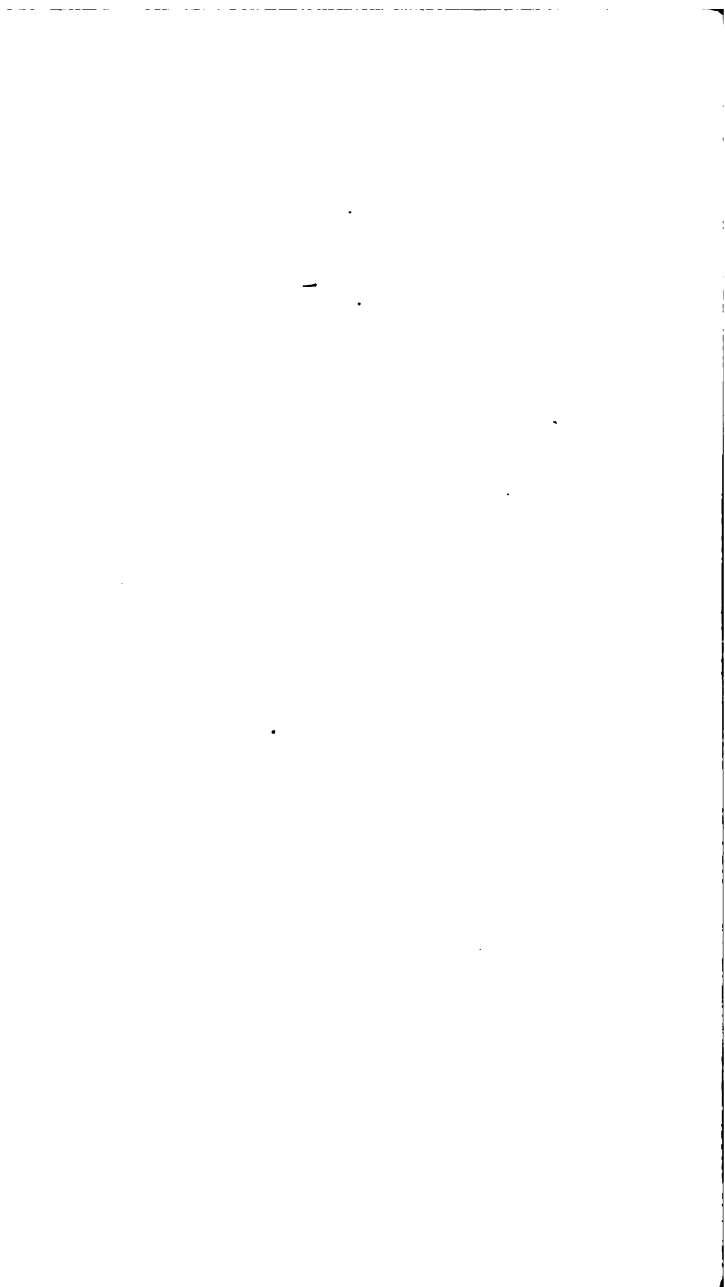
Par. (b). In *interlocutory* proceedings, as distinguished from adjudicatory or final proceedings. — (W. § 4.)

Par. (c). In *appellate* proceedings, as distinguished from proceedings of trial of fact.

ART. 2. The rules of Evidence, as herein contained, do
9 apply without variation in the following kinds of proceedings, except as otherwise expressly provided:

Par. (a). In proceedings in *chancery* and at *common law*. — (W. § 4.)

Cross-references. The principal rules in which such a difference is expressly provided are as follows: (1) Mode of taking testimony in writing (*post*, § 488); (2) mode and time of making objections (*post*, §§ 71-93); (3) mode of framing cross-interrogatories (*post*, §§ 914, 922); (4) number of witnesses required (*post*, § 1500); (5) discovery before trial (*post*, § 1325); (6) reformation of instruments for mutual mistake (*post*, § 1895).



10 *Par. (b).* In trials *criminal* and *civil*. — (W. § 4.)

Cross-references. The principal rules in which such a difference is expressly provided are as follows: (1) Corroboration of accomplices and of other kinds of witnesses in certain criminal issues (*post*, §§ 1517–1520); (2) moral character of the accused in a criminal case (*post*, §§ 130–137); (3) rules concerning *corpus delicti*, bigamy, etc. (*post*, §§ 1535–1537); (4) confessions of an accused (*post*, § 700); (5) measure of persuasion for the jury in a criminal case (*post*, § 2022); (6) presumptions and burden of proof for the respective parties in a criminal case (*post*, §§ 2064–2066).

Illustrations. (1) Doe is alleged to have defrauded Roe by means of representations that a policy of life insurance could be obtained by paying money and taking shares of stock. To evidence the fraudulent knowledge and intent of Doe, his representations of a similar sort, made to other persons, are admissible, either in a criminal prosecution for fraud or in a civil action for damages by reason of the deceit. — (W. § 321.)

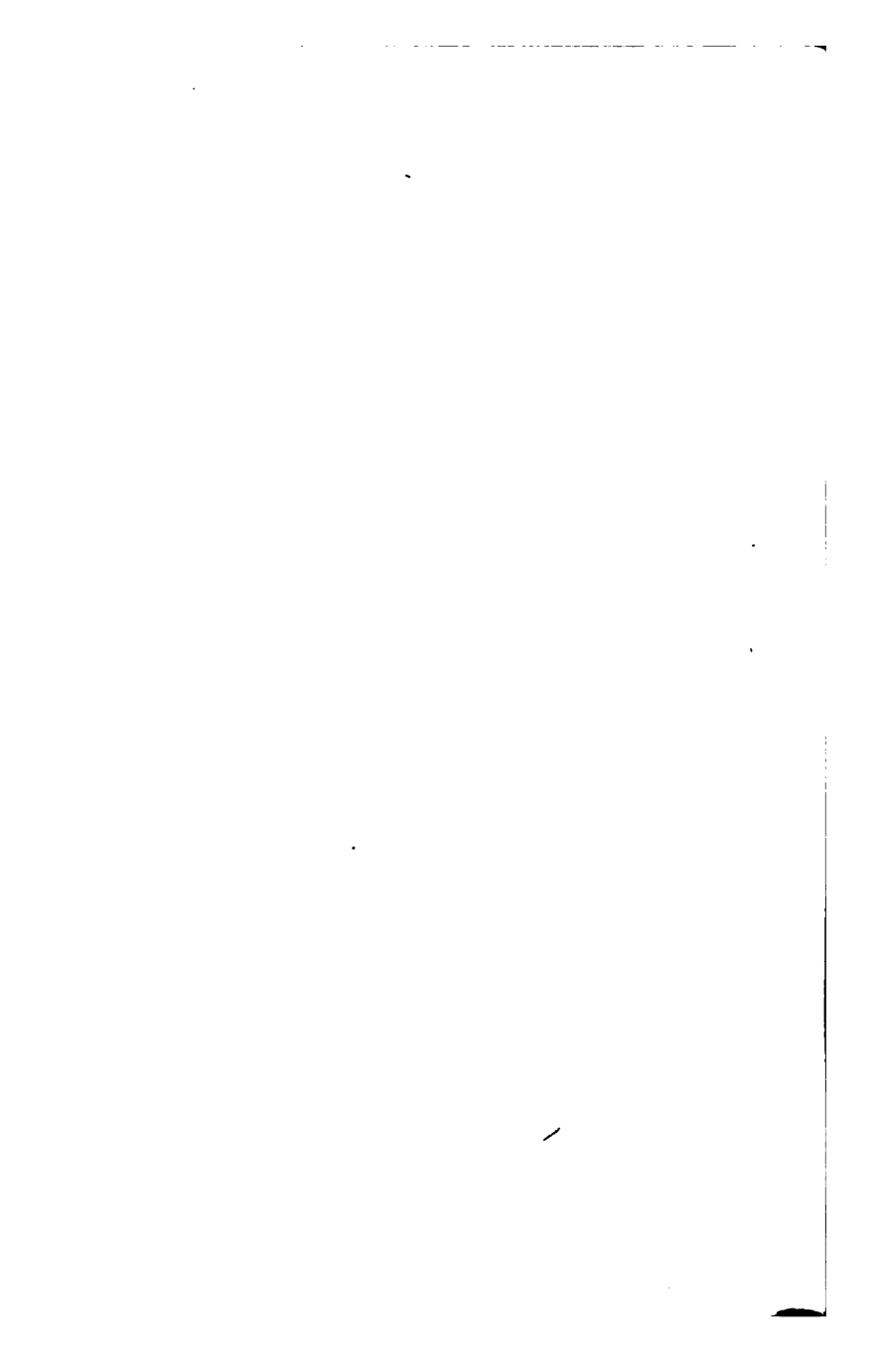
(2) In a trial involving the death of Doe at the hands of Roe, the testimony of a deceased witness J. S., given at a former trial of the same case under cross-examination, is admissible, whether the case be a civil action for damages due for the death or a criminal prosecution for manslaughter; the requirement of cross-examination being no different, and the constitutional provision having only the effect of making the rule unalterable by the Legislature for criminal cases.¹ — (W. § 1398.)

(3) Doe publishes a statement that Roe has forged a check. In a criminal prosecution of Roe for forgery, the charge must be believed by the jury beyond a reasonable doubt; but in a civil action for slander by Roe against Doe, with a plea of truth, the jury may believe by a preponderance of evidence. — (W. § 2498.)

(4) The goods of Doe were shipped by the common carrier Roe, but never delivered. A statute made a common carrier liable for goods feloniously taken by his servants. In an action for the value of the goods, the carrier's failure to offer the testimony of the servants would be a circumstance of inference against him (under § 658, *post*); but in a prosecution of the servants for feloniously taking the goods, their failure to testify would not be a circumstance of inference against them (under § 1746, *post*). — *Vaughton v. R. Co.*, 12 Cox Cr. 580 (1874).

Distinctions. By the rules of evidence a fact may be admissible evidentially in either a criminal or a civil case; yet the legal effect of the *factum probandum* may by the

¹ A few Courts refuse this view.



substantive law be different in a criminal charge and a civil claim:

(a) The defendant, being treasurer of the Navy, and charged with misapplication of public moneys received, a certificate for money received by the defendant's subordinate officer is admissible in any case to show that officer's receipt of the money; but the officer's receipt of the money does not of itself charge the defendant with criminal responsibility. — (Lord Melville's Trial, 29 How. St. Tr. 746 (1806).)

RULE 5. Evidence before Trial; Jury's Deliberations; Judge's

- 11 Instructions on Evidence.** The rules herein contained do not include rules of procedure concerning the taking or use of evidence before a trial or after a trial (extra-judicial), but include only the rules affecting the use of evidence at a trial (infra-judicial), except as otherwise expressly provided.

In particular,

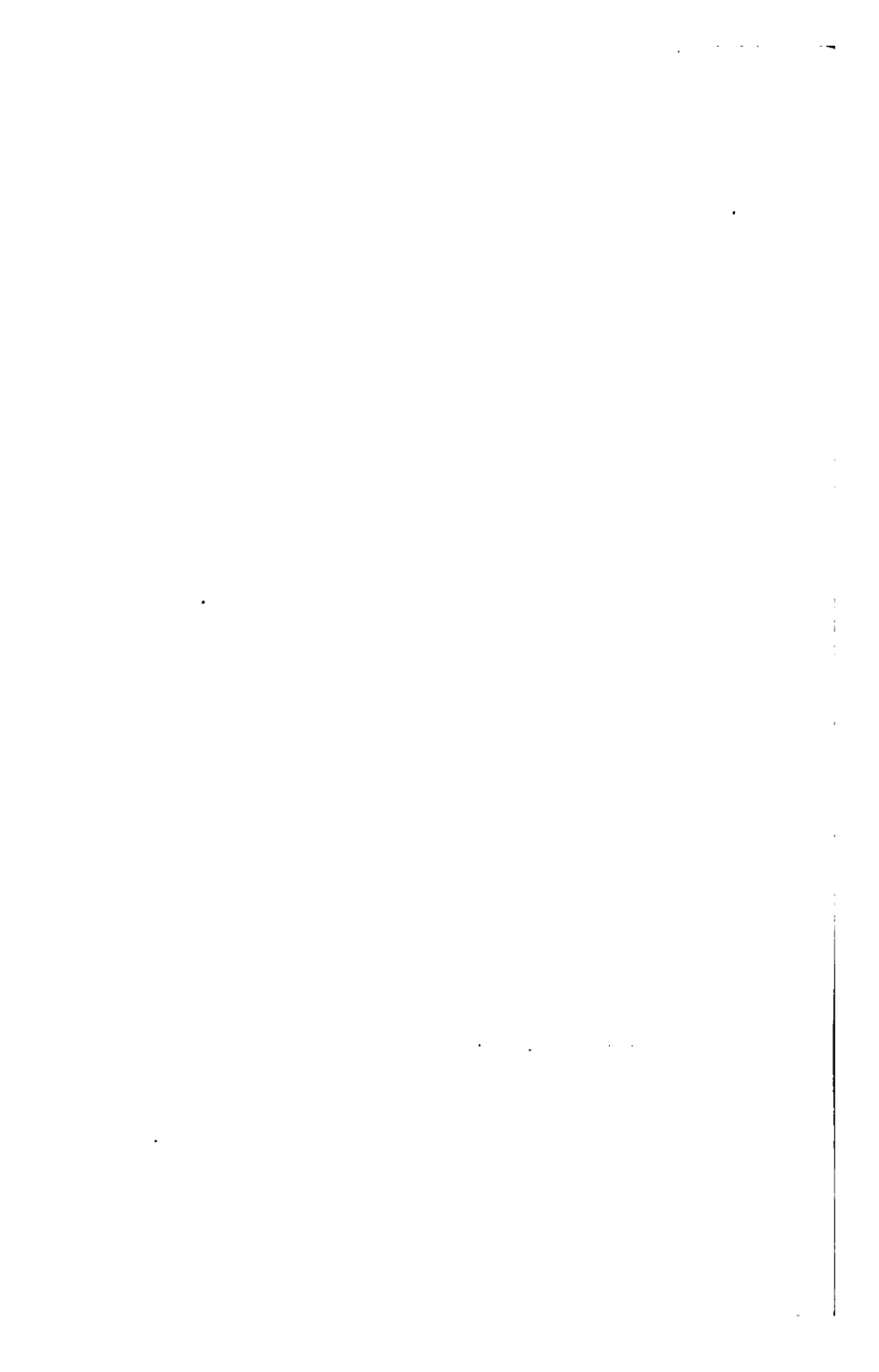
- 12 Par. (a).** Rules of procedure for the officers authorized to take depositions or acknowledgments, and for the mode of taking them, are not here included, except so far as a rule of evidence at the trial is thereby involved.

Illustrations. (1) Whether a party may before trial have process to take a deposition before a notary public, or to take a deposition of a convict in prison, is a rule of procedure not here included; but whether he may use such a deposition on the trial is a rule of evidence here included (*post*, § 928).

(2) Whether a party may have process to obtain discovery from a party-opponent before trial is equally a rule of procedure before trial, but it is here included because of its relation to the rule of evidence excluding witnesses and documents not discovered on demand before trial (*post*, § 1325).

- 13 Par. (b).** Rules of procedure for *summoning witnesses*, tendering fees, exempting from process, etc., are not here included, except so far as the privilege of the witness, as a rule of evidence at the trial, is dependent on them.

- 14 ART. 1.** No specific rule of evidence controls or applies to the *jury's use of evidence* after it has been admitted by the judge under the rules of admissibility, except as follows:— (W. §§ 29, 2550, 2551.)



Par. (a). The rule as to the *measure of persuasion*, i. e. whether by preponderance of evidence or beyond reasonable doubt (*post*, § 2022);

Par. (b). The rules of law as to *presumptions* affecting a party's duty to produce evidence (*post*, § 2034);

[*Par. (c).* The rule of *falsus in uno* (*post*, § 573);]¹

Par. (d). The rules of *quantity*, requiring more than one witness, or corroboration, or the like, in specific issues (*post*, §§ 1502, 1516).

[*Par. (e).* The rules for *confessions* (*post*, § 700) and for *dying declarations* (*post*, § 951), which may be applied anew by the jury to reject such evidence from their consideration, even after the judge has admitted it, if the rules so require.]²

Par. (f). The rule of *multiple admissibility* (*post*, § 44).

Cross-references. The respective functions of judge and jury in general are dealt with in §§ 2100-2115, *post*.

ART. 2. *The judge shall give the jury no instructions of law as to the weight or credit to be given by them in considering any piece of evidence or class of evidence which has been by him admitted as evidence to be considered by them; except as follows:*³

Par. (a). The judge may instruct the jury as to the application of the various rules mentioned in Art. 3, *supra*.

Par. (b). The judge may instruct the jury to disregard (1) any evidence which after being admitted has later been struck out by him (under § 95, *post*) as having been incorrectly admitted in the first instance; or

¹ This is an unsound rule, obtaining in many courts.

² This paragraph represents the anomalous and unsound rule prevailing in some courts.

³ (NOTE: This rule has always been, in theory and practice, a corner-stone of jury trial. In recent times, practice in this country has more and more violated it. It is here to be said that this rule and Art. 3, with Rule 18, § 49, *post* (trial Court's discretion) and Rule 23, § 102, *post* (new trials for error) can alone serve to rescue our law of trials in the future from becoming a putrid and unmanageable mass of decisions).



(2) any matter which, though not admitted by him as evidence, has somehow come or may come to the notice of the jury and cannot properly be considered by them as evidence.

Illustration. (1) The jury may be instructed to disregard the testimony of a witness whose disqualification is not discovered until cross-examination and whose testimony has then been struck out.

(2) The jury may be instructed to disregard the remarks of counsel improperly asserting facts not in evidence, or to avoid reading parts of an account-book which have been sealed up as irrelevant.

Par. (c). The judge may instruct the jury that they may consider as in evidence any specific fact, or class of facts, which is legally admissible as evidence but has naturally come to their notice without a formal offer by a party in the usual manner, as by interrogation or otherwise.

Illustrations. The usual examples of this kind of evidence are: the demeanor of a witness (*post*, § 534); the party's failure to produce evidence in his power (*post*, § 658); the self-contradictions of a witness contained in his own testimony (*post*, § 578);

Par. (d). The judge may instruct the jury to consider as proved any fact which is the subject of judicial notice (*post*, § 2120) or of a judicial admission (*post*, § 2140) under the respective rules of those topics.

16 of [ART. 3. The judge *may express to the jury, after the close* of evidence and argument, *his personal opinion* as to the credibility or weight of the evidence or any part thereof.]¹ — (W. § 2559.)

¹ (NOTE: This is not the law today in any jurisdiction, except in New Jersey and in the Federal Courts. But it ought to be. Perhaps a reaction will some day come, to redeem us from the great error which we committed two generations ago in thus abandoning one of the best traditions of jury-trial at common law. It is because of this abandonment of a sound rule, representing a natural part of the judge's function, that in recent times the same irrepressible function has tended to satisfy itself by the violation of the rule of Art. 4, as noted above).



RULE 6. *Conflict of Laws ; Rule of the Forum.* The rule of
17 the forum of trial is to furnish the rules of evidence — (W.
§ 5); with the following exceptions and distinctions:

ART. 1. Where by the rule of the forum an official state-
ment in writing is receivable testimonially if made under an
official duty, (*post*, § 1090), it is sufficient if the law of the place
of the official's act recognizes such a duty, even though the law
of the forum does not. — (W. §§ 5, n. 9, 1633, 1644, 1675, 1677.)

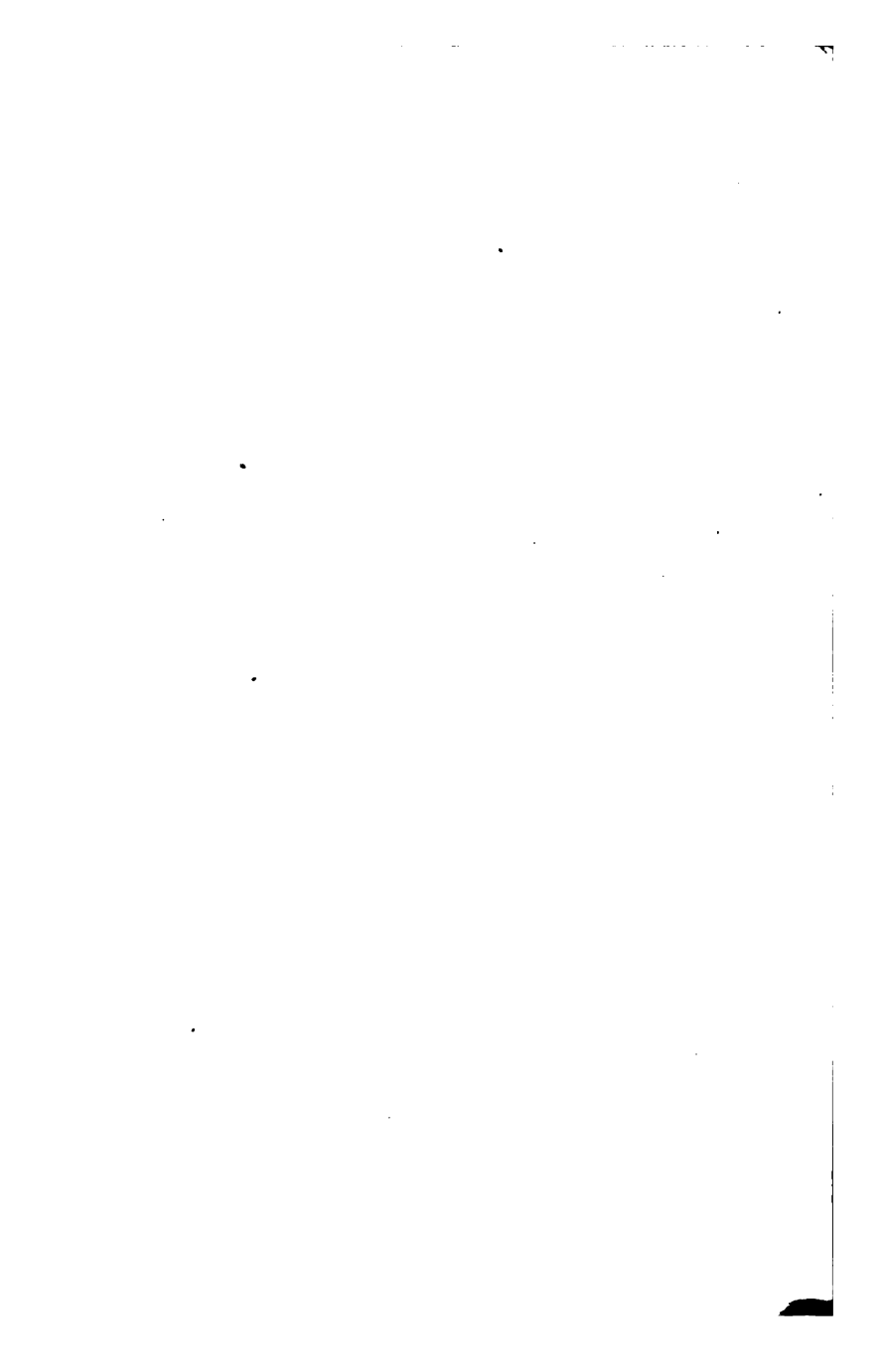
ART. 2. Where a document is to be authenticated, the
18 kind of evidence admissible or sufficient for the purpose is
determined by the rule of the forum; except so far as the
principle of Art. 1 permits resort to the rule of some other
place for admitting an official certificate of authenticity. —
(W. §§ 2163-2169.)

ART. 3. Where for a trial to be held in one jurisdiction
19 a deposition is to be taken in another jurisdiction, the
rules of the former jurisdiction determine the admissibility
of the deposition on trial; but the rules of the latter juris-
diction determine the mode of compelling the deponent
and of taking the testimony before the officer in so far as
the use of compulsory process is concerned or so far as State
policy has proscribed any rules limiting such proceedings
within its territory. — (W. §§ 5, n. 8.)

ART. 4. Where a rule of substantive law or of judicial
20 jurisdiction is involved, and not a rule of evidence, the
general principles for conflict of laws on those subjects
apply. — (W. § 5.)

Illustrations. (1) A will appears to be attested by three
attesting witnesses. If by the rule of the forum two only
are required to be called, that rule applies, whether by the
rule of the testator's domicile or of the place of the property
the rule requires the calling of three or one or more. But
so far as the validity of the will depends on the number of
witnesses attesting it, the different rule of the domicile or
of the place of property may require to be applied.

(2) An official marriage register in France is desired to
be proved in New York by a copy made by a notary; a French



rule admitting a notary's copy of a marriage register will not *per se* suffice to admit it in New York; but if in New York a copy of an official register is admissible when made by the officer having custody of it, and the French notary is shown to have the custody, then the copy is admissible. Whether the purporting notarial seal shall be presumed genuine will be determined by the rule of New York.

(3) On a trial in Illinois the deposition is desired of a citizen of Illinois who is in Massachusetts. Whether the person may be compelled to appear before the officer appointed to take the deposition depends on the law in Massachusetts; but whether the deposition may be received as that of a non-resident depends on the law in Illinois.

(4) A bill of lading is given in Illinois for shipment of goods to Massachusetts, and is signed by the consignor. Litigation arises in Massachusetts. If by the general principles of conflict of laws the rule of the place of making the contract is to govern, then the rule of Illinois determines whether the consignor may in spite of his signature dispute his knowledge of the bill's contents (parol evidence rule), and whether any part of the contract resting in parol is binding (statute of frauds); both of these rules belonging to the substantive law, though usually spoken of as rules of evidence.

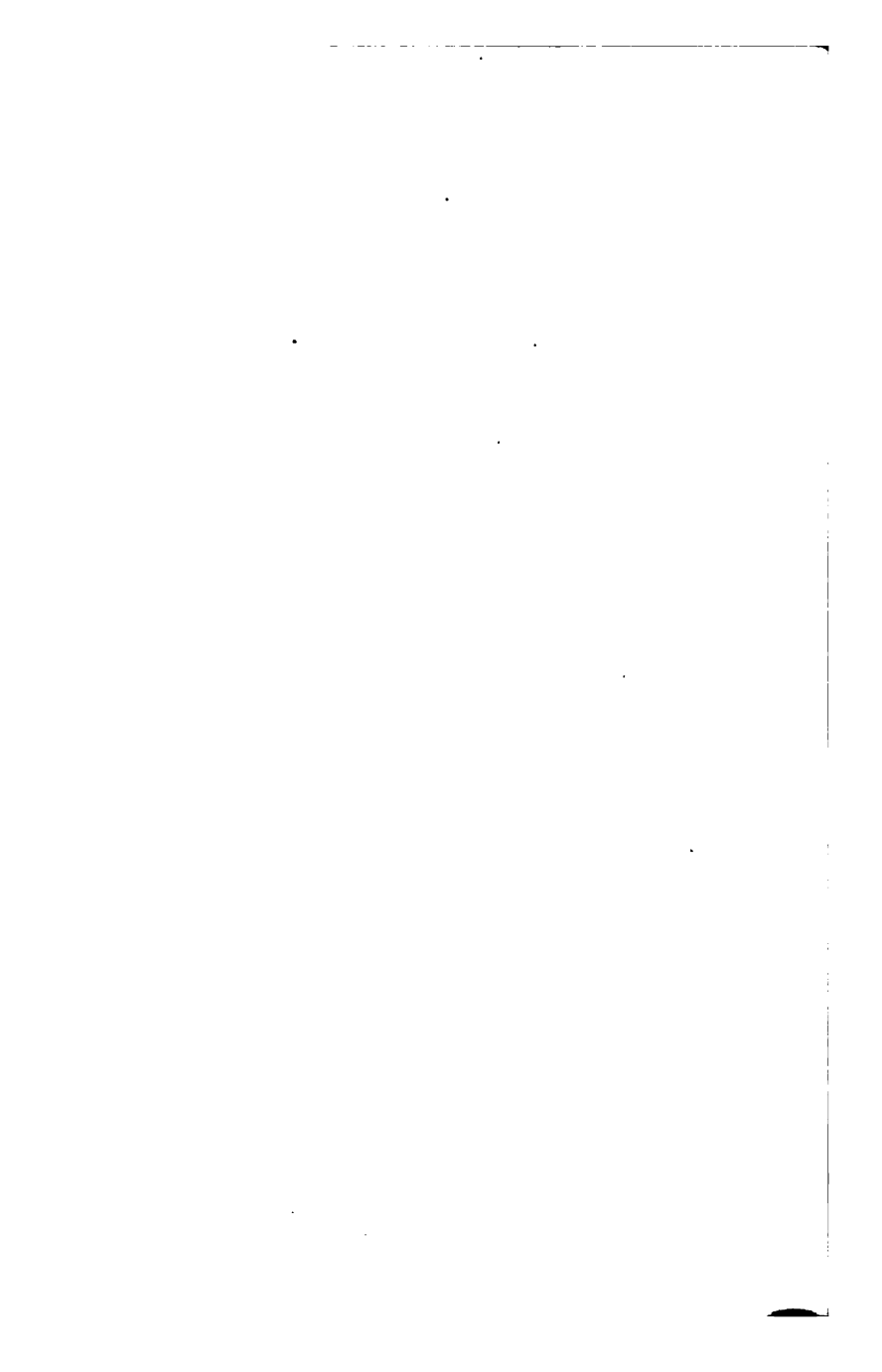
RULE 7. *Conflict of Laws; Federal and State rules.* In 21 the respective jurisdictions of State, Federal, and Territorial Courts in the United States, each is governed in its own trials, independently of the others, by its own rules of evidence, on the principle of Rule 6, except so far as the Federal Constitution compels or the respective State statutes permit a variation. — (W. § 6.)

Such variations are as follows:

ART. 1. *State Courts.* The Court of a State applies the 22 State rule of evidence, under the general principle of Rule 6;

Par. (a) even where a Federal statute has made a rule of evidence for documents not bearing a *revenue-stamp*; — (W. § 6, n. 11, and § 2184.)

Par. (b) but *except* that for the *authentication of official documents* it recognizes as an alternative method the rule of the Federal statute; — (W. § 1680, n. 3, and § 1681, n. 12.)



*Par. (c) and except that it is bound by any rule of the Federal Constitution that dominates over State law.*¹ — (W. § 7, n. 10.)

ART. 2. *Federal Courts.* In the Federal Courts, the rules of evidence of the State in which the trial is held are adopted as the Federal rules, unless by Federal constitution, treaty, or statute, an inconsistent rule is expressly enacted; with the following exceptions and distinctions:

(*Reason and Policy:* Inasmuch as a Federal Court usually sits within a particular State, and as the counsel are also practitioners in the courts of that State and are therefore accustomed to its settled rules of procedure, the above general rule is a simple, flexible, and wholesome one for procedure in general).

24 *Par. (a).* In *equity proceedings*, the foregoing general rule applies. — (W. § 6.)

25 *Par. (b).* In *admiralty proceedings*, the foregoing general rule applies. — (W. § 6.)

26 *Par. (c).* In *common law criminal trials*, the foregoing general rule does not apply, but instead is applied the State common law rule which was in force at the time of the entrance of the State into the Union.² — (W. § 6.)

27 *Par. (d).* In *common law civil trials*, the foregoing general rule applies.

28 *Par. (e).* The State rule, when it is to be followed, may be a *statutory* rule; except under *par. (c) supra*.

29 *Par. (f).* The State rule, when it is to be followed, may be *any rule* of evidence, and not merely a rule for the qualifications of witnesses. — (W. § 6.)

30 *Par. (g).* The State rule as to *depositions*, when it is to be followed, is only the rule as to the mode of taking, and not the rule as to the mode of using. — (W. § 6.)

RULE 8. *Constitutional Rules; Legislative Alteration.* Except where a Constitution by embodying expressly a specific

¹ This presumably might serve to also cover the rule of *Par. (b), supra*, under the full-faith-and-credit clause; but that rule can be rested on the ground of comity.

² This is an unreasonable modification.



rule of evidence has made it unalterable by the Legislature, the Legislature has the power to alter any rule of evidence; subject to the following distinctions and exceptions: — (W. § 7, n. 7.)

ART. 1. A prohibition against *ex post facto* laws does not
32 apply to a law altering a rule of evidence. — (W. § 7, n. 9.)

ART. 2. A constitutional rule of *property* or other sub-
33 stantive law cannot be altered by a statute which in form purports to make only some rule of conclusive evidence under Rule 133 (*post*, § 906). — (W. §§ 1353, 1354.)

ART. 3. A statute which usurps the judicial function in
34 purporting to make a rule of conclusive evidence or presumption so as to prevent the judicial investigation and ascertainment of the facts material to a right or liability is invalid under Rule 133 (*post*, § 906). — (W. §§ 1353, 1354.)



BOOK I: ADMISSIBILITY

(WHAT FACTS MAY BE PRESENTED AS EVIDENCE)

INTRODUCTION:

GENERAL THEORY AND PROCEDURE OF ADMISSIBILITY

TOPIC I: GENERAL THEORY

RULE 10. *First Axiom of Admissibility.* None but facts
35 having rational probative value are admissible. — (W. § 9.)

Illustration. In a trial for homicide, the fact is offered that the accused was requested, with others, to touch the corpse of the murdered man, to see if blood flowed, but that he refused to do so; this is admissible, not because the flowing or retention of the blood at the guilty man's touch would be rationally evidential of his guilt, but because a particular person's refusal to touch may be evidence of his consciousness of guilt, under Rule 118 (*post*, § 650).

RULE 11. *Second Axiom of Admissibility.* Any fact having
36 a rational probative value is admissible, unless some specific rule herein forbids. — (W. § 10.)

Illustrations. (1) On an issue involving an act of forgery, the disposition of the person's character as to acts of honesty or dishonesty, is of some rational probative value towards showing that he did or did not do the act; it is therefore admissible, unless some specific rule of prohibition is applicable, such as the rule against the prosecution's use of the accused's character, or the rule against a civil party's use of his character.

(2) On an issue whether a person was on board a vessel lost at sea, the fact of his prior intention to sail on that vessel is of probative value, and is admissible; but to evidence that

intention, the hearsay rule forbids the admission of his declarations, unless an exception to the hearsay rule is applicable.

RULE 12. *Classification of the Rules of Admissibility.* The 37 rules of Admissibility are divided into three groups:— (W. § 12.)

The first group of rules define the conditions of probative value which suffice to entitle a fact to be regarded as evidential; these are rules of Relevancy (including the relevancy of Circumstantial, Testimonial, and Autoptic Evidence), and are contained in Rules 24-123 (*post*, §§ 105-734).

The second group of rules lay down auxiliary tests and safeguards, appropriate to special classes of evidence, and designed to overcome special weaknesses or risks shown by experience to exist; these are rules of Auxiliary Probative Policy, and are included in Rules 125-193 (*post*, §§ 745-1643).

The third group of rules allow certain extrinsic policies, important to the community in general, to override temporarily the purpose of ascertaining the truth, and therefore to exclude facts for reasons independent of their probative value; these are rules of Extrinsic Policy, and are included in Rules 194-212 (*post*, §§ 1650-1870).

RULE 13. *Admissibility, distinguished from Weight or Proof;*
38 *Function of Judge and Jury.* When an offered fact satisfies all the rules of these three groups, being forbidden by none, it is said to be Admissible; that is, the jury may consider it as part of the evidential material which is to persuade them to the conclusion represented in their verdict. — (W. §§ 12, 28.)

ART. 1. The judge alone determines the Admissibility of
39 an offered fact, pursuant to Rule 229 (*post*, § 2100).

ART. 2. The jury alone determines the persuasive effect,
40 or Weight, of a fact admissible for their consideration, subject to the provisions of Rule 5, Arts. 3, 4, 5 (*ante*, § 14).

RULE 14. *Admissibility, distinguished from Relevancy.* A
41 fact offered as relevant for a specific purpose must satisfy all

the rules applicable to it for that purpose in any of the groups of rules mentioned in Rule 12 (*ante*, § 37); so that its admissibility signifies that it is not only relevant, under the first group of rules, but is also not forbidden by any rule under the remaining two groups. — (W. § 29.)

RULE 15. *Multiple Admissibility.* When a fact is offered 42 for one purpose, and is admissible in so far as it satisfies all rules applicable to it when offered for that purpose, its failure to satisfy some other rule which would be applicable to it if offered for another purpose does not exclude it. — (W. § 13.)

Illustrations. (1) On an issue of the sanity of J. S., a letter from M. to J. S., concerning a business transaction, and J. S.'s conduct in ordering a sale of an estate in answer to the letter, is admissible as conduct of J. S. relevant to show his mental capacity, (*post*, § 252); but the inadmissibility of the letter (*post*, § 910), as a hearsay statement of M. upon the mental capacity of J. S., does not prevent the former use of the letter in connection with the conduct of J. S. — (W. §§ 228, 1786.)

(2) On an issue of murder of M. by J. S., with a plea of self-defence, the prior threat of M. to kill J. S. is not admissible (*post*, § 279) to show J. S.'s reasonable apprehensions of assault, unless communicated to J. S.; but its inadmissibility for this purpose does not prevent its admissibility (*post*, § 182) as evidence of M.'s design to kill J. S. and therefore of his probable aggression, provided it satisfies the other rules applicable to the latter purpose. — (W. §§ 110, 247.)

(3) A purporting deed not shown by some appropriate evidence to be genuine is not admissible (*post*, § 1595) as an instrument of grant conveying title from the purporting grantor; but the same document, if acted on by an occupant of the land under claim of prescriptive title, is admissible (*post*, § 1245) as a verbal act of his, indicating the extent of land occupied by him; and its inadmissibility for the former purpose does not prevent its admissibility for the latter purpose. — (W. § 2132.)

(4) The extra-judicial admissions of a wife may not be admissible against her husband, because the rule prohibiting her testimony against him may apply equally to her judicial admissions (*post*, § 1713); but if her statements were made publicly in his presence without dissent, his silence may make them his own admissions, and as such they would be admissible against him (*post*, § 668); yet, if they were made privately to him, the further rule against the use of confidential marital communications (*post*, § 1812), being equally appli-

cable to them in either of the above aspects, would exclude them for either purpose. — (W. § 2338.)

43 *Par. (a).* The possibility that the jury might improperly apply to an inadmissible purpose a fact admissible for another purpose does not exclude it.

44 *Par. (b).* The party against whom a fact is admitted under this Rule may ask the judge to *instruct the jury* as to the limited purpose for which the fact is admissible; and the party's failure to ask for such an instruction is a waiver of objection to the inadmissibility of that fact. — (W. § 13.)

+
45 **RULE 16. *Conditional Admissibility.*** If an offered fact would by any rule be admissible only after or together with other facts, it may be admitted provisionally when offered, subject to the later introduction of the other facts under Rule 163 (*post*, § 1360). — (W. § 14.)

46 **RULE 17. *Curative Admissibility.*** Where an inadmissible fact has been offered by one party and received, and the opponent afterwards, for the purpose of negating or explaining or otherwise counteracting it, offers a fact similarly inadmissible, the following rules apply: — (W. § 15.)

47 **ART. 1.** If the opponent *did not duly object* to the fact originally offered, the second fact

a. [is admissible if it serves to remove an unfair effect upon the jury which might otherwise ensue from the original fact.]¹

b. [is admissible.]¹

c. [is inadmissible.]¹

Illustrations. (1) In an action for loss of support of the plaintiff's husband, due to intoxication caused by the defendant, the plaintiff has offered the inadmissible fact of prior acts of intoxication caused by the defendant; to rebut any unfair prejudice from this fact, the defendant may introduce testimony in denial of it.

¹ Clause *a* is the sound rule, obtaining in a few jurisdictions. Cl. *b* is the rule in England and a majority of U. S. jurisdictions. Cl. *c* is the rule in a few jurisdictions. Rulings of Cl. *b* are often really examples of the rule of Cl. *a*.



(2) In an action on a contract to purchase goods, the defendant having refused to perform on the ground of the goods being not equal to sample, the plaintiff introduces the inadmissible fact that the defendant has purchased his goods from other persons at a cheaper price; to remove the prejudicial impression of this fact, the defendant may explain the circumstances of these purchases.

[ART. 2. If the opponent *did duly object* to the fact 48 originally offered, the second fact is admissible on the same conditions as in Art. 1 *supra*.]¹

Distinctions. (1) Whether a party who has originally objected is deemed to *waive by subsequently introducing similar evidence* (*post*, § 91);

(2) Whether facts admissible to *impeach a witness' character* may be rebutted or explained by *denying* them (Rule 111, *post*, § 608) or by *consistent statements* (Rule 113, *post*, § 612);

(3) Whether a *collateral fact* may be disproved (Rule 107, *post*, § 568);

(4) Whether the party may *re-examine* to facts which he might have put in on the direct examination (Rule 164, *post*, § 1378).

49 [[RULE 18. *Discretion of the Trial Court. In all rulings upon the admissibility of evidence, the trial Court's determination is final and absolute*; subject to the following distinctions and exceptions:]] — (W. § 16.)

(NOTE: This is the second great commandment of enlightened trial procedure, which forms, with the rule as to instructions on the weight of evidence (Rule 5, *ante*, §§ 15, 16) and the rule against new trials for erroneous rulings on admissibility (Rule 23, *post*, § 102), a chief hope of future progress towards attaining truth by trials. The following articles, as they stand, do not represent accurately the law in any one jurisdiction; but our trial procedure will remain a solemn game until they do represent the law everywhere.)

50 ART. 1. The trial judge is bound to *obey the rules* of evidence, and therefore *does not have discretion*, in the sense of determining the admissibility of facts by his personal views or changeable beliefs as to what is just.²

¹ No authority on this point has been found; but the case is stronger for the opponent than that of § 47, because he cannot be charged with a waiver, and yet his dilemma, when the fact's admissibility is doubtful, is just as meritorious.

² See Note 1 on the next page.



ART. 2. The trial judge's determination is *not final*, i. e.,
 51 it is subject to the usual methods of appeal, in so far as his statement of the *tenor of a rule of law* is objected to as an erroneous statement of the rule.¹

[ART. 3. The trial judge's determination is *final*,

52 *Par. (a) in the application of a rule of evidence to a particular offer of evidence;*² and

*Par. (b) in the finding of any facts preliminary to or otherwise involved in the application of a rule to the offer.]*³

Illustrations. (1) To prove the contents and execution of a deed, a certified copy of the record is offered, without evidence of the loss of the original. The trial judge rules it to be admissible. This ruling is not final, under Art. 2, so far as involves the judge's statement of the rule of law to be that no loss need be shown before using a certified copy of the record. The ruling is final, under Art. 3, *Par. (a)*, so far as the question arises whether the exceptional rule for recorded deeds is the applicable one instead of the ordinary rule for documents in general. The judge's ruling is final, under Art. 3, *Par. (b)*, so far as the question of fact arises whether the original deed is sufficiently shown to be lost.

(2) On a prosecution for murder, the defendant offers to show prior threats by the deceased against the defendant. The trial judge rules this to be inadmissible. This ruling is not final, under Art. 2, so far as involves the judge's statement of the rule of law to be that communicated threats are inadmissible unless an overt act was done by the deceased, or that uncommunicated threats are not admissible at all. The ruling is final, under Art. 3, *Par. (a)*, so far as the question arises which of these rules is applicable to the offer as made. The ruling is final, under Art. 3, *Par. (b)*, so far as the question of fact arises whether the threats were communicated, or whether there was an overt act.

(3) A witness is objected to as not qualified to testify to the nature of certain stains said to be bloodstains. The rule of evidence that every witness must have sufficient experience on the subject of his testimony would be undisputed; but the question might arise whether by rule of evidence special experience is needed for recognizing a bloodstain; this ought

¹ These two articles are intended to emphasize the important distinction between "discretion" as meaning a right to decide on personal grounds without any fixed rules, and "discretion" as meaning the finality of the decision. These articles are the law everywhere, and ought to be.

² This is the law in only a few jurisdictions and on a few subjects, e. g. the qualifications of an expert witness.



to be regarded as a question of the application of the general rule to the specific offer (under Art. 3, Par. a) rather than of the tenor of an abstract rule of law (under Art. 2); yet most jurisdictions do have concrete rules of law for the different kinds of expert facts, and therefore the ruling would not be final. But the judge's finding that this witness was by trade a butcher would be final under Art. 3, Par. (b), and the judge's ruling that a butcher is a person qualified to know about blood would plainly be a ruling upon the application of the law to a specific offer, final under Art. 3, Par. (a).

(4) A child-witness eight years old is objected to as not competent to take the oath. Whether there is a rule exempting children from the oath, or a rule declaring children of eight years incompetent, is an appealable ruling of law. But whether the rule applies to admit the particular child offered as a witness, and whether, in applying the rule, the child is of a certain age, are final rulings under Art. 3, Par (a) and Par (b).

[ART. 4. An appeal may be taken from rulings under
53 Art. 3, provided the appellant shows *prima facie* that the alleged error would entitle him to a new trial under Rule 23, (*post*, § 102), and also files such an affidavit of merits, subject to a penalty, as is otherwise usual to deter from frivolous or dilatory proceedings.¹]

(NOTE: In order to simplify the working of the rules of Arts. 2 and 3, the trial judge should follow the form of ruling used in other countries, *i. e.*, by stating the rule of law, as understood by him, separately from the application of it to the offer and the preliminary facts; thus (in Illustration a, above): "The rule is that an original deed must be shown lost, but there is an exception for a certified copy of a recorded deed. This exception applies here, so that the original's loss need not be shown; for the copy offered is a certified copy of the record." This enables the Supreme Court to separate at once the final from the appealable part of the ruling. If there were a Code, the trial judge would rule: "Under Code § 781, I rule that this is a certified copy and is therefore admissible without showing the loss of the original.")

Cross-references. For specific rules of evidence in which the principle of the trial judge's finality of decision is regularly applied, in some jurisdictions, see Rule 73, *post*, § 344, (specific instances of conduct, etc.), Rule 83, *post*, § 377, (witness' qualifications), Rule 107, *post*, § 567, (witness' impeachment), Rule 126, *post*, § 759, (loss of document), Rule 163, *post*, § 1352, (order of evidence).

¹ This ought to prevent frivolous exceptions, and yet gives ample safeguards. It takes the place of the usual fruitless phrase about "abuse of discretion." But it is not now law.



TOPIC II:

PROCEDURE IN QUESTIONS OF ADMISSIBILITY

RULE 19. *The Offer of Evidence.* All evidential facts, in
55 order to be admissible, must be offered to the tribunal by
one of the parties; *except*

56 *Par. (a)* where the matter naturally comes to the atten-
tion of the tribunal in the ordinary course of the trial,
under Rule 5 (*ante*, § 15, par. (c)); and

57 *Par. (b)* where the judge of his own motion orders the
production of the evidence, under Rule 224 (*post*, § 1990);
and

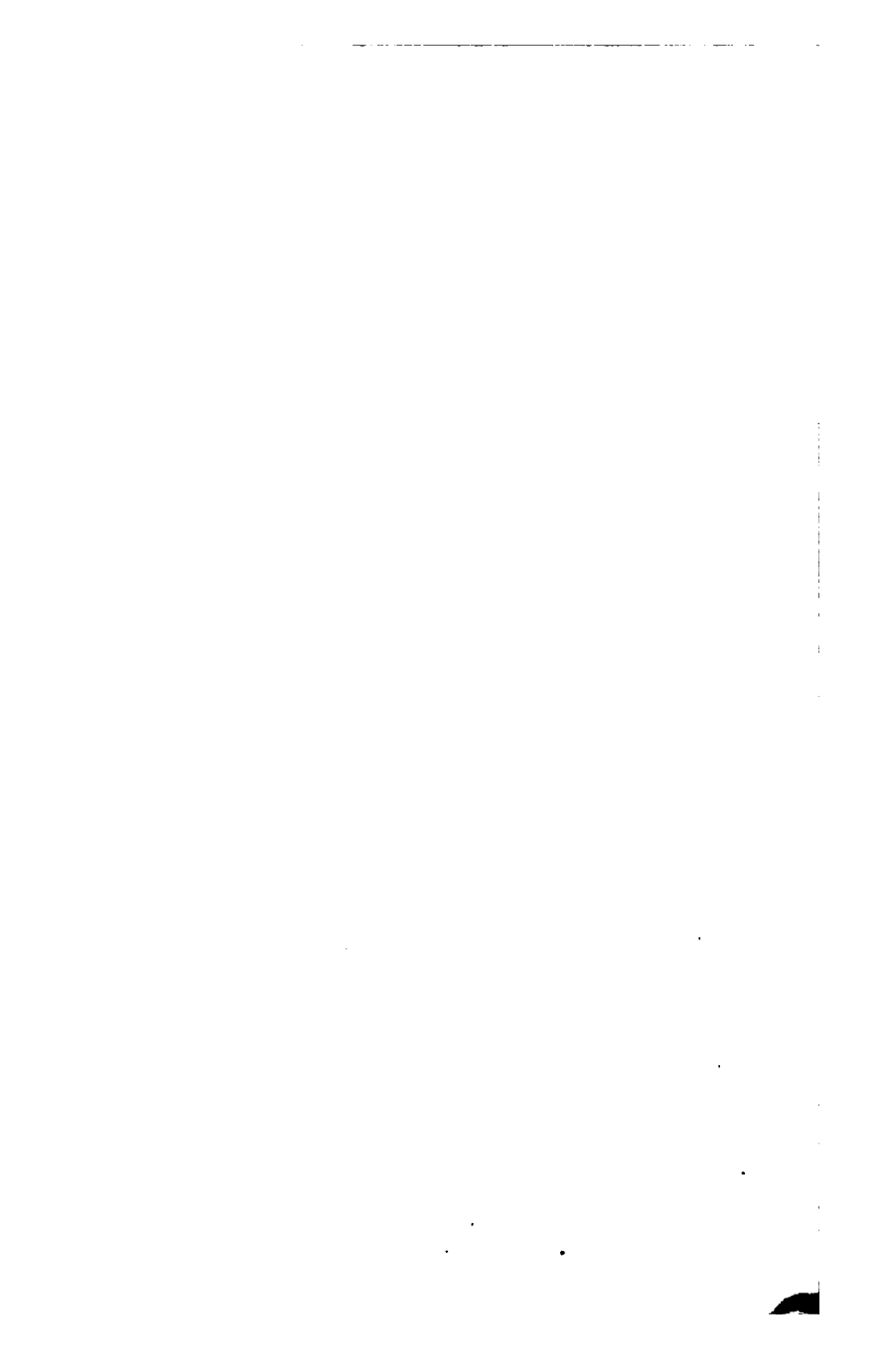
58 *Par. (c)* where the judge or the jury may take judicial
notice of the matter, under Rule 230 (*post*, § 2120).

ART. 1. *Time of the Offer.* The time of the offer *at the trial*
59 is determined by the rules governing the Order of Presenting
Evidence (Rule 163, *post*, § 1352); but testimony taken
by deposition *before trial* must also fulfil the rules of the Code
of Procedure as to filing before trial, and the like.

ART. 2. *Form of the Offer.* The offer may be made in
60 any form that suffices to make plain to the judge that the
counsel desires and is ready to bring the evidence to the
attention of the jury; with the following exceptions and dis-
tinctions: — (W. § 17.)

Par. (a). The offer need not be *in writing*; although by
certain other rules the evidence itself may need to be in
writing;

62 *Par. (b).* The offer may be made by *calling a proposed*
witness to the stand and by *asking him a question* as to the
proposed evidential fact; except where the evidential fact
is required to be proved in some other mode, as by the



exhibition of a corporal thing, the reading of a deposition, etc.

Cross-references. For the rules as to the *mode of interrogation*, the reading of a *deposition*, etc., see Rules 92-95, *post*, §§ 461-497.)

63 *Par. (c).* The offer of a party's own case must be, not merely a tentative proposal, nor a promise of expected evidence, but in substance a presentation of *evidence actually ready*.

Cross-reference. For an offer of evidence *conditionally admissible*, see Rule 163 (*post*, § 1360).

64 *Par. (d).* The offer on a cross-examination must not be a question intended merely to convey to the jury a *groundless insinuation*.

Cross-reference. This kind of offer is also partly covered by Rule 156 (*post*, § 1271).

ART. 3. *Tenor of the Offer.* The sufficiency of an offer to
65 satisfy the rules of evidence depends exclusively upon its specific contents regarded as a whole; with the following consequences: — (W. § 17.)

66 *Par. (a).* If the fact offered is admissible only for a *certain purpose*, or only in *connection* with another fact, the offer is not sufficient unless it specifies the purpose or the other fact.

Cross-references. This involves *conditional admissibility* (Rule 163, *post*, § 1360). For the rule that an *expected but excluded answer* must also be specified, see Rule 22 (*post*, § 100).

67 *Par. (b).* If *two or more facts* are included in the offer, of which one or more is admissible and another is not, the offer is not sufficient.

68 *Par. (c).* If the fact is offered for *two or more purposes*, for one of which it is inadmissible, the offer is not sufficient.

69 *Par. (d).* If the fact is offered for a specified *inadmissible purpose*, the offer is not sufficient, even though there existed an admissible purpose not specified.

70 *Par. (e).* If the fact is offered for a specified *admissible purpose*, the offer is sufficient, even though there existed an inadmissible purpose not specified.

Cross-reference. This results from the principle of Multiple Admissibility, under Rule 15, (*ante*, §§ 42-44).

RULE 20. *The Objection to Evidence.* For the purposes of
71 subsequent appeal or other correction of errors, no erroneous admission of evidence can be availed of unless the party against whom it was offered has duly made objection. — (W. § 18.)

ART. 1. *Time of the Objection.* An objection must be made
72 as soon as the ground of it is known, or could reasonably have been known, to the objector, unless some special reason makes its postponement desirable for him and not unfair to the offeror; with the following further rules of detail:

Par. (a). For evidence first taken *at the trial*, the objec-
73 tion to a *person* on the ground of his personal disqualification as a witness must be made when the person is first called to the stand, subject further to Rules 75-79 (*post*, §§ 362-366).

Cross-reference. These further rules, concerning *voir dire*, etc., are best placed with the rules for Qualifications of a Witness.

Par. (b). For evidence first taken *at the trial*, the objec-
74 tion to a *fact* or group of facts must be taken at the moment after the offeror has uttered his question or otherwise made his offer of the fact; *except* that where the ground of the objection is found only in some feature of a *witness' answer* which could not have been relied upon until the answer was made, the objection may and must be made immediately after the answer.

Par. (c). For the purpose of being enabled to make due
75 objection, the opponent is entitled to see any *writing* before it is offered in evidence, subject to Rules 89, 161 (*post*, §§ 440, 1345).

Par. (d). The objection must be *positive*, not hypo-
76 thetical; but the right to object may be expressly *reserved* till a later time, if the opponent cannot at the usual time practicably know the possible grounds for objection; as, where a lengthy deposition is offered or a series of complicated facts.



Cross-reference. Compare the rule for a *judge's reservation* of his ruling (Rule 21, *post*, § 94).

- 77 *Par. (e).* The objection must be *repeated* for each separate offer of evidence, even though the fact offered and the ground of objection be the same;

provided (1) that where the offeror in renewing his offer seeks *merely to evade* the objector's vigilance, or where the offeror expressly or impliedly *consents*, an objection to the same fact or witness or to the same class of facts or witnesses need not be renewed; and

provided (2) that where a fact has been admitted *conditionally* only, and the condition is not fulfilled later, a renewal of the objection is necessary under Rule 163 (*post*, § 1360).

- 78 *Par. (f).* For evidence taken by *deposition before trial*, [the objection must be made before trial and at the time of the taking;

provided (1) it was then feasible to be taken, and

provided (2) the ground of the objection was such that it might have been obviated by the offeror before the time of offering at the trial.]¹

Illustrations. Ordinarily, all objections to the *procedure* of taking, the manner of interrogatories, the form of the answer, and the like, will be proper at the time of taking. Ordinarily, all objections to the *materiality* or *relevancy* of facts offered need not be made till the trial; although sometimes a fact whose irrelevancy could be removed by a further question to the same deponent would fall in the former class. Objections to the qualification of a witness may fall in either class; as also objections to the auxiliary rules, such as the rule for producing original documents, the opinion rule, and others.

- 79 *Par. (g).* For evidence taken by *deposition before trial*, objections which ought to be made before trial need not be made until after the deposition is returned and filed, so far as the ground of the objection is found in the documentary form of the officer's return; and then by a motion to suppress or amend it.

¹ This is the broad rule as sometimes generalized. But more usually its statement is found (not so satisfactorily) in the shape of specific rules on the details noted in the *Illustrations*.



80 *Par. (h).* For evidence taken by *deposition before trial*, an objection made before trial must be renewed at the time of the offer of the deposition on the trial, except so far as a prior motion to suppress or amend has disposed of it.

81 *Par. (i).* A failure to make objection at one trial does not amount to a waiver of objection for a *subsequent trial*, except so far as a failure to object before the former trial would have had that effect.

82 **ART. 2. *Form of the Objection.*** An objection need not be made in any particular *form of words*, provided the objector makes it plain to the judge that he desires to have the evidence not admitted for the consideration of the jury.

An objection made to a witness' answer after it is uttered is termed a *motion to strike out*.

An objection made to a deposition before trial is termed a *motion to suppress*.

83 **ART. 3. *Tenor of the Objection.*** An objection may be, according to its tenor, either general or specific. A *general* objection is one which merely asserts the offered evidence to be inadmissible. A *specific* objection is one which additionally specifies the principle or rule by reason of which the offered evidence is said to be inadmissible. — (W. § 18.)

84 *Par. (a).* A *general* objection, *if overruled* by the trial judge, is not sufficient for any consideration on appeal; *except* that it will be sufficient if on the face of the evidence, considered in its relation to the whole case, there appears no purpose whatever for which the offered evidence could have been on any conditions properly admitted.¹

85 *Par. (b).* An objection stating that the offered evidence is "*incompetent*" or "*irrelevant*" or "*immaterial*" is deemed a general objection.

86 *Par. (c).* A *general* objection, *if sustained* by the trial judge, suffices for consideration on appeal:

except (1) that it will not be sufficient if on the face of the evidence, considered in its relation to the whole of the case, there appears no ground of objection which could have been on any conditions valid; and

¹The phrasing differs somewhat in different courts.



[*except* (2) that it will not be sufficient if the offering party has asked for and the objector has then failed to specify a ground of objection].¹

87 *Par. (d).* A *specific* objection, if *overruled* by the trial judge, is not sufficient for the consideration on appeal of any ground of error *other than the one* specified;

except that it will be sufficient if on the face of the evidence, considered in its relation to the whole case, there appears no purpose whatever for which the offered evidence could have been on any conditions properly admitted.

88 *Par. (e).* A *specific* objection, if *sustained* by the trial judge, is sufficient for the consideration on appeal of any ground of error, other than the one specified, which could not by possibility have been obviated by the offeror during trial if it had been specifically stated. — (W. § 18.)

89 *Par. (f).* An objection is to be construed as an *indivisible whole*; so that where an objection is made to a question or answer involving *two or more facts*, or to the *entire testimony* of a witness, or to any other composite offer a part of which is liable to a specific objection though another part is not, it is insufficient, whether overruled or sustained, for consideration on appeal, unless it expressly specifies the part to which the ground of objection is directed. — (W. § 18.)

90 ART. 4. *Waiver of the Objection.* An objection may be waived expressly or impliedly.

91 *Par. (a).* The objector waives an objection when he himself subsequently introduces evidence which is directed to prove or disprove the same matter and is liable to the same objection;² — (W. § 18.)

except where the subsequent evidence is in fairness needed to *rebut or explain* evidence introduced upon an *overruled* objection.

Illustration. Deed of A signed by mark; the plaintiff offers a deposition of M, living in the jurisdiction, to the identity of A's mark. The defendant objects to the sufficiency of evidence of execution, and also to the deposition of M who

¹The second exception is an implied corollary.

²This rule is difficult to phrase with precision; the risk is of stating it too broadly.

is living and able to attend court; both objections are erroneously overruled. The defendant afterwards offers the deposition of N, living in the jurisdiction, denying that A was illiterate, etc.; this is a waiver of the first objection, but not of the second.

Distinctions. (a) Compare the rule for Curative Admissibility (Rule 17, *ante*, §§ 46-48). There the question is whether the subsequent evidence is of right now admissible, while here the question is whether its admission now prevents the party from complaining of the original error.

(b) Distinguish the rule that an error of *exclusion* by sustaining an objection is cured by the *opponent's* subsequent *introduction of the same evidence*; here it is not that a waiver exists, but that the error becomes immaterial (Rule 23, *post*, § 102).

92 *Par. (b).* The objector may by other conduct, depending on the circumstances of the case, be deemed to have waived an objection.

93 **ART. 5. Burden of Proof.** The burden of proving to the judge the existence of the facts which form the grounds of an objection, but are not apparent on the face of the offer, is ordinarily not on the objector; because by Rule 19 (*ante*, § 65), the sufficiency of an offer is to be determined from its tenor as made.

Exceptions to this rule are stated in connection with the various kinds of evidence to which they apply.

Cross-references. Compare the rules for disqualification by interest, infancy and insanity (Rules 80, 81, 84, *post*, §§ 367, 370, 388), for confessions (Rule 122, *post*, § 700).

94 **RULE 21. The Ruling of the Judge.** An objector is *entitled* to an *immediate* and *final* ruling before the close of the offeror's case, declaring the offered evidence inadmissible or admissible either absolutely or conditionally, in so far as otherwise he would be unfairly disadvantaged by his inability to know whether evidence in rebuttal or explanation would be needed. — (W. § 19.)

95 **ART. 1.** An objector is not entitled to an immediate and final ruling directly on objection made, and therefore cannot complain of a subsequent *revocation* of a ruling of admission by striking out the admitted evidence, merely in so far as

concerns the effect of the admitted evidence upon the jurors' minds.

ART. 2. In case of a revocation of ruling under Art. 1,
96 the objector is entitled upon request to an instruction to the jury to disregard the evidence struck out.

RULE 22. *The Exception to the Ruling.* A ruling cannot be
97 considered for purposes of appeal unless the party dissatisfied therewith has so indicated at the time to the judge and the other party in some suitable manner. This notice of dissent is termed an Exception. — (W. § 20.)

ART. 1. *Time of the Exception.* The exception must be
98 taken immediately upon the ruling; unless the Rules of Court prescribe otherwise.

ART. 2. *Form of the Exception.* The exception must be
99 in writing, signed by the counsel and the judge; except so far as the Rules of Court prescribe otherwise.

ART. 3. *Tenor of the Exception.* The exception must show
100 the evidence offered, the objection and its grounds, the ruling, and the notice of exception, and all other matters necessary for determining the correctness of the ruling and the materiality of the error if any, such as the expected answer to the question, where a question was excluded, or the answer made, where a question was allowed. — (W. § 20.)

ART. 4. *Further Requirements.* The exception must further
101 satisfy all other rules of procedure applicable to exceptions in general, such as its confirmation by motion for new trial, or the like.

Distinctions. Distinguish the rules for a motion to take the case from the jury for *insufficiency of the evidence as a whole* (Rule 226, *post*, § 2009).

RULE 23. *New Trial for Erroneous Ruling.* [An erroneous ruling by the trial judge, in admitting or excluding evidence, shall not be a ground for ordering a new trial or otherwise reversing a judgment, if the jury's verdict, without the erroneously admitted evidence, or with the erroneously excluded



*evidence, ought nevertheless to have been to the same effect as actually rendered.]*¹ — (W. § 21.)

(NOTE: This is the third great commandment of enlightened trial procedure; it forms, with the rule as to instructions on the weight of evidence (*ante*, §§ 15, 16), and the rule for the finality of the trial Court's determinations (*ante*, § 49), the foundation of future progress. It is probably not yet the law, as actually enforced, in any jurisdiction.)

[ART. 1. In applying the foregoing rule, the party complaining of error shall have the burden of convincing that the verdict ought to be set aside.]

¹ This is the orthodox phrasing in the earlier English cases. Other judicial phrasings are: "If the verdict is clearly supported by evidence properly admitted, it shall not be set aside for the erroneous admission or rejection, etc." "If the evidence admitted or rejected could not have changed the result, the verdict will not be set aside"; "If the verdict is manifestly for the right party, the verdict will not be set aside for the erroneous admission or rejection of evidence." "If the erroneous admission or rejection of evidence ought not to have affected the verdict." The following phrasing is from the Indian Evidence Act, § 167, drawn by Sir J. Stephen: "The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision."

PART I: RELEVANCY

INTRODUCTORY PROVISIONS:

GENERAL PRINCIPLES OF RELEVANCY

§ 105 RULE 24. *Kinds of Evidence.* All evidential sources, *i. e.* materials for persuading the tribunal of some *factum probandum*, as defined in Rule 3 (*ante*, §§ 3-7), are divided into three classes, namely, Testimonial, Circumstantial, and Autoptical. — (W. § 24.)

§ 106 ART. 1. *Testimonial Evidence.* An evidential fact is said to be Testimonial when it is the assertion of a human being offered as evidence of the truth of the matter asserted.

§ 107 *Par. (a).* Such an assertion is termed Testimonial Evidence whether the matter asserted is a fact directly forming a *part of the issue* under the pleadings, or is merely a *subsidiary fact* relevant as evidence of some other fact under Rule 3, Art. 4 (*ante*, § 7).

Illustration. In an issue of homicide, the defendant alleging an alibi, part of his evidence is that his house was on fire at the time, ten miles away, and that he was burned in trying to extinguish it; the physician's assertion that he saw and treated the defendant's burns is testimonial evidence, no less than the eye-witness' assertion that the deceased was killed with a knife.

§ 108 *Par. (b).* Such an assertion is termed Testimonial Evidence, whether it is uttered *on the witness stand* in the jury's hearing, or is uttered *out of court* before trial. In either case it is governed by the general principles for Qualification, Impeachment, and Rehabilitation of Witnesses (Rules 80-122, *post*, §§ 367-734). In the latter case, it is governed additionally by the Hearsay rule (Rule 134, *post*, § 910); but the first-named general principles then

suffer special modifications, provided for in the sections dealing with the Hearsay rule.

Illustration. In an action for non-payment of a debt, a broker testifies for the defendant that the defendant placed money in his hands for the payment of the debt. If, instead of the broker making this statement on the stand, he has made it as an entry in an account-book, it would be equally testimonial evidence, if offered and received, but it would first have to satisfy one of the exceptions to the Hearsay rule.

ART. 2. *Circumstantial Evidence.* An evidential fact is
109 said to be Circumstantial when it

(1) is any fact other than a human assertion offered to evidence the truth of the matter asserted, and

(2) is offered in evidence of any other matter to be proved. — (W. § 25.)

110 *Par. (a).* Such a fact is termed Circumstantial, whether it is offered as evidence of a *factum probandum* forming a part of the issue, or is offered as evidence of a subsidiary alleged *factum probandum* which is itself only relevant as evidence to some other *factum probandum* under Rule 3, Art. 4 (*ante*, § 7).

Illustration. In a prosecution for homicide, the fact is offered (1) that the defendant came out of the room in which the deceased was then immediately found dead alone; from this we infer directly (2) the defendant's act of killing. Or, the fact is offered (1) that the defendant's gun was found discharged, near the body, shortly after the killing, whence we infer (2) that it was discharged by him, and (3) that it was the discharge of his gun which killed the deceased. In both instances, the fact is circumstantial, however directly or indirectly the evidential fact is related to the *factum probandum* in issue.

111 *Par. (b).* Such a fact is termed Circumstantial, whether it is itself, as a *factum probandum* under Rule 3, Art. 4 (*ante*, § 7), evidenced by testimonial evidence or by autopsical evidence or by other circumstantial evidence.

Illustration. In a prosecution for robbery, the fact that the defendant ran away and escaped from the house by jumping through and breaking a closed window is offered as evidence of his guilt; this is circumstantial evidence, whether it be itself evidenced by the statement of an eye-witness, or by the fact of finding in the defendant's coat a piece of glass



matching the window (proved again by a witness), or by the jury's inspection of the window and the glass found in the defendant's coat.

ART. 3. *Autoptical (Real) Evidence.*¹ A fact is said to be
112 evidenced Autoptically when it is offered for direct perception by the senses of the tribunal without depending on any conscious inference from some other testimonial or circumstantial fact. — (W. § 24.)

113 *Par. (a).* A fact evidenced autoptically, i. e. by the tribunal's own perception, may be either a matter forming part of the issue under the pleadings, or only a fact *circumstantially evidential to some other* relevant fact, or some form of testimonial evidence.

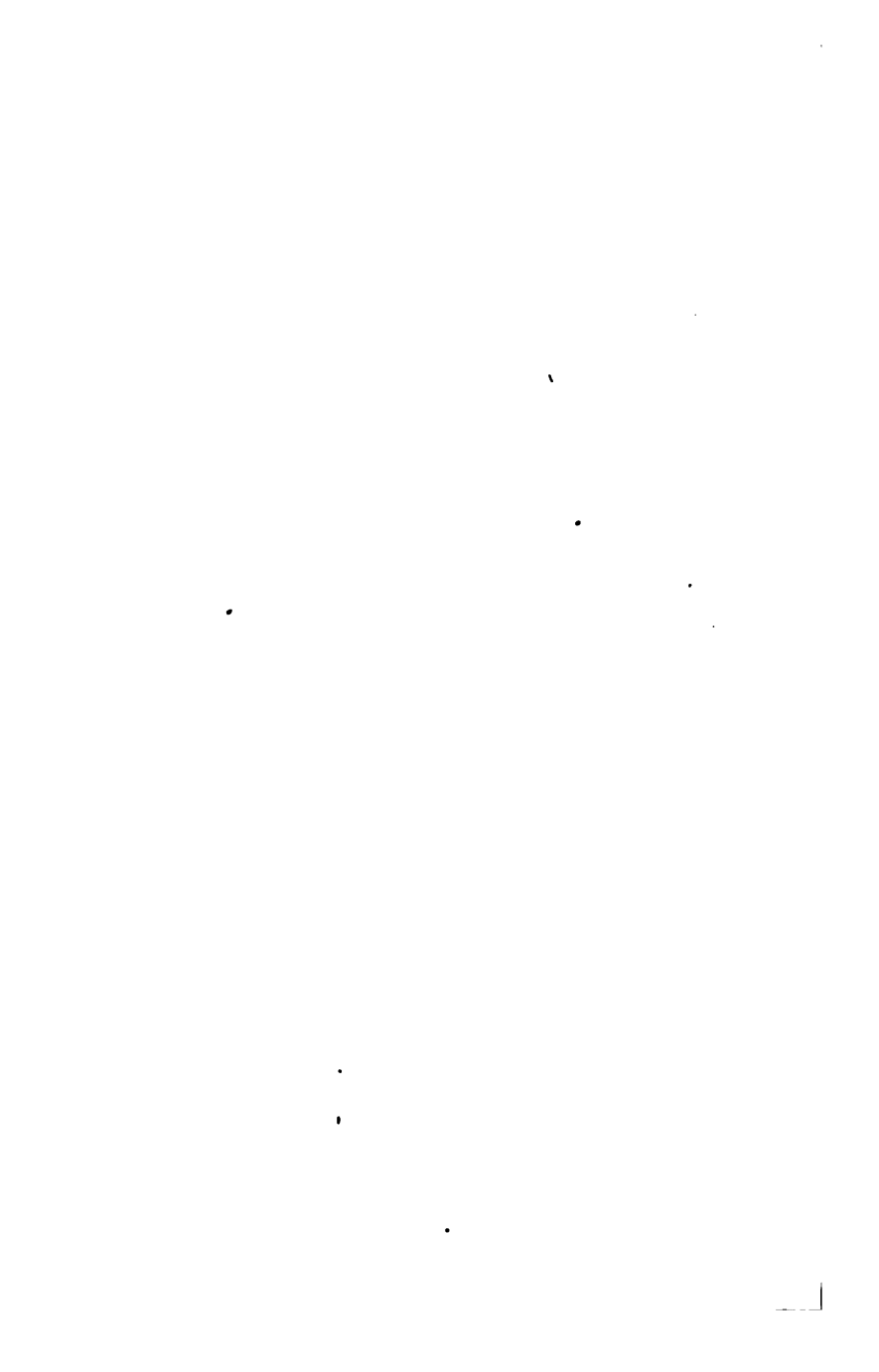
Illustration. (1) In an issue of bastardy, the alleged father having red hair, the fact that the child has red hair, if evidenced autoptically, is itself only evidential circumstantially of the further fact of the defendant's paternity; and its circumstantial relevancy for that purpose may be questioned, irrespective of the propriety of ascertaining the fact of the child's red hair autoptically.

(2) In an action for failure to deliver goods under a contract of sale, a document offered for the inspection of the jury to learn its tenor may be the very contract in issue, or a letter of the defendant offered as an admission, or a book of entries by a deceased clerk offered as a hearsay statement, or a deposition of an absent witness.

114 *Par. (b).* A fact evidenced autoptically is to be regarded as a *part of the evidence*, in the sense that it is a proper mode of producing persuasion in the tribunal, subject to the rules specially applicable thereto (Rule 123, *post*, § 730). But it is not to be regarded as evidence, for the purpose of applying rules applicable only to testimonial and circumstantial evidence; since in the latter classes the tribunal is asked to make an inference from the evidential fact to some other fact, while in the former the tribunal is asked to perceive immediately by the senses without inference.

ART. 4. *Relative Weight of Circumstantial and Testimonial*
115 *Evidence.* There is no fixed rule determining the relative weight

¹ The old term "Real Evidence" is too misleading to be preserved.



of the two kinds of evidence in a given controversy.—
(W. § 26.)

(*Reason and Policy.* In considering whether the facts in issue have been sufficiently proved, it is apparent that the quantity of testimonial evidence and of circumstantial evidence varies greatly in different controversies according to the nature of the particular issue; and that no case is without some testimonial evidence and no case is without some circumstantial evidence. Moreover, in most instances the facts of circumstantial evidence are themselves evidenced by testimonial evidence; so that the precise effect of each is hard to disentangle. Furthermore, the greater or less weight of testimonial evidence depends upon considerations which affect the trustworthiness of a single class of evidence, namely, the assertions of human beings, while the weight of circumstantial evidence depends upon the trustworthiness of inferences from experience with a great variety of facts, so that there is no known standard of measurement which they possess in common. Again, the two kinds of evidence are seldom brought into such direct contrast that they can be feasibly compared and measured, *i. e.* so that a single *factum probandum* can be found to be affirmed purely by testimonial evidence but negated purely by circumstantial evidence.)

116 *Par. (a).* There is no inherent defect in either kind, as such, which should prevent it from producing persuasion, and there is no inherent superior value in either kind, as such, over the other.

[The prohibition of Rule 5, Art. 4 (*ante*, § 15), against instructing the jury as matter of law upon the weight of evidence, does not prevent the judge from explaining to the jury, in such equivalent language as he may deem fit, the foregoing considerations, so as to remove any erroneous views which they may entertain as to the relative weight of the two kinds of evidence.]¹

117 ART. 5. *Logical Principles applicable.*² The logical process by which any offered fact is receivable is inductive, in the form, Fact A is some evidence from which Fact X may be inferred. The potential defect in this process is that one or more other inferences or explanations

¹ This paragraph is not law, as above phrased; but some such instruction is conceded to be proper.

² This Article is of no direct service, except as a basis to which to refer later rules.



may be the true one, instead of the one alleged. But there can be no inflexible test of admissibility, in practical logic for judicial trials; since in different classes of facts the law must consider partly the differing views of human experience as to such facts, partly the relative practical availability of stronger facts, and partly the hardship of certain inferences if unfounded. The general underlying principle is, for both circumstantial and testimonial evidence: A fact is admissible as evidence of a *factum probandum*, if the inference desired to be drawn from it to the *factum probandum* is in human experience fairly capable of belief as possible or probable, having regard in a given case to the greater or less number of other and different inferences to which the fact is also naturally open. — (W. §§30-33.)

Illustrations. A, a gardener employed at an insane asylum is charged with larceny of valuables; the following facts are offered: that he ran away from the asylum on the discovery of the theft, that he was poor, that he possessed no cash before the larceny but a large sum afterwards, that an insane patient asserts that A took the valuables. Here there is for each fact one or more possible inferences other than A's guilt; but in the second and fourth instances the other and competing inferences may be relatively so strong that the fact will not be admitted as evidence of the guilt of A.

Par. (a). For an *opponent* the logical process is the same as that of a *proponent*, with the following modifications:

- (1) He may advance a *new* evidential fact;
- (2) He may *deny* the *proponent's* evidential fact; or,
- (3) He may *explain away* the *proponent's* evidential fact by offering the facts which make the other inferences from it to be more probable.

The last process is termed *Explanation*, and makes admissible the facts thus serving. — (W. §§ 34, 35.)

Illustration. To charge A with murder, the prosecution shows a specific threat, an old quarrel, and blood-traces on clothes. The accused (1) advances the new facts of an alibi and a character for peaceableness; (2) denies the specific threat; (3) explains away the old quarrel by showing a reconciliation, and explains away the blood-traces by showing the recent killing of a chicken.

TITLE I: CIRCUMSTANTIAL EVIDENCE

INTRODUCTORY PROVISIONS: GENERAL PRINCIPLES

RULE 25. *Degree of Probative Value required.* When a fact
118 is offered as circumstantial evidence of a *factum probandum*, there is no general rule for determining the logical sufficiency of the inference for admissibility, except the general logical principle applicable to all evidence, as declared in Rule 24, Art. 5 (*ante*, § 117).¹ — (W. § 38.)

A fact logically sufficient to be admitted is termed *relevant*.

Distinguish the term *material*, which signifies a *factum probandum* under Rule 3, Art. 5 (*ante*, § 7).

ART. 1. *Specific Rules Prevail.* The relevancy of a specific
119 fact offered as circumstantial evidence is determined by ensuing specific rules applicable to particular classes of evidence. [[When no specific rule is expressly applicable, the general principle is applied by the trial Court under Rule 18 (*ante*, § 52).]]

ART. 2. *Collateral or Remote Evidence.* The terms “col-
120 lateral” and “remote,” as applied to circumstantial evidence, have no other meaning than to signify the kind of evidence that does not satisfy the present Rule 25 (*ante*, § 118) or any other specific rule of Relevancy herein contained. — (W. § 39.)

Distinctions. Distinguish the use of the terms as applied to specific instances of the operation of a machine, the danger of a highway, etc., under Rule 73 (*post*, § 344), to other crimes offered to evidence intent, etc., under Rule 65 (*post*, § 297), to the contradiction of witnesses under Rules 107 and 108 (*post*, §§ 567, 574), to oral agreements accompanying a writing, under Rule 217 (*post*, § 1920).

¹ This general canon is practically of little or no service. It must be inserted, however, to avoid the loose phrasings often found.

ART. 3. *Conditional Relevancy.* A fact which does not
121 appear to be relevant when offered may be admitted conditionally, on the terms laid down in Rule 163, (*post*, § 1360). — (W. § 40.)

ART. 4. *Circumstantial Evidence proved by the Same Kind.*
122 A fact relevant circumstantially as evidence of another admissible fact is admissible even though the other fact is itself desired to be used as circumstantial evidence of a third fact; and so on, without regard to the number of inferences desired to be added.¹ — (W. § 41.)

Illustration. On a trial for homicide, the defendant's gun is found discharged; this fact is relevant to evidence the fact that it was he who discharged it, which is relevant to evidence the further fact that his discharge of it shot the deceased; here the feature that the offered fact requires two inferences before it leads to a fact in issue, and that both inferences are circumstantial, does not exclude the evidence. Whether that evidence alone would suffice to take the case to the jury is a different question, under Rule 226 (*post*, § 1997); but practically such a question would never be presented.

RULE 26. *Multifariousness or Confusion of Issues; Undue*
123 *Prejudice; and Unfair Surprise.* A fact circumstantially relevant in itself may nevertheless be excluded because of the effect upon it of one of the Auxiliary Rules of Probative Policy (Rule 125, *post*, § 745), particularly of those rules which exclude facts capable of causing excessive confusion of issues (Rule 165, *post*, § 1383) or undue prejudice (Rule 166, *post*, § 1390) or unfair surprise to the opponent (Rule 161, *post*, § 1325). But so far as specific kinds of relevant circumstantial evidence are affected and excluded by such other principles, the resulting composite rules are declared in this part of the Code in connection with the rules for specific kinds of circumstantial evidence. — (W. § 42.)

Illustrations. (1) The moral character of a defendant accused of homicide may be of logical probative value and therefore relevant to show that he did or did not commit the act of homicide; yet the principle of preventing undue prejudice may sometimes exclude such character when offered by the prosecution.

¹ This represents every day's practice, though it is theoretically denied in some Courts.

(2) To evidence a witness' capacity for truth-telling, his specific acts of fraud or perjury on other occasions may be of probative value and therefore relevant; yet the principle of preventing unfair surprise may forbid the use of such acts as evidence of his character, unless in such a manner as to avoid the danger of unfair surprise.

(3) To evidence the dangerous condition of a highway or of a machine, repeated particular instances of its injurious effects in use or operation under similar circumstances may be relevant; yet the principle of preventing excessive confusion of issues may exclude such facts in a given case.

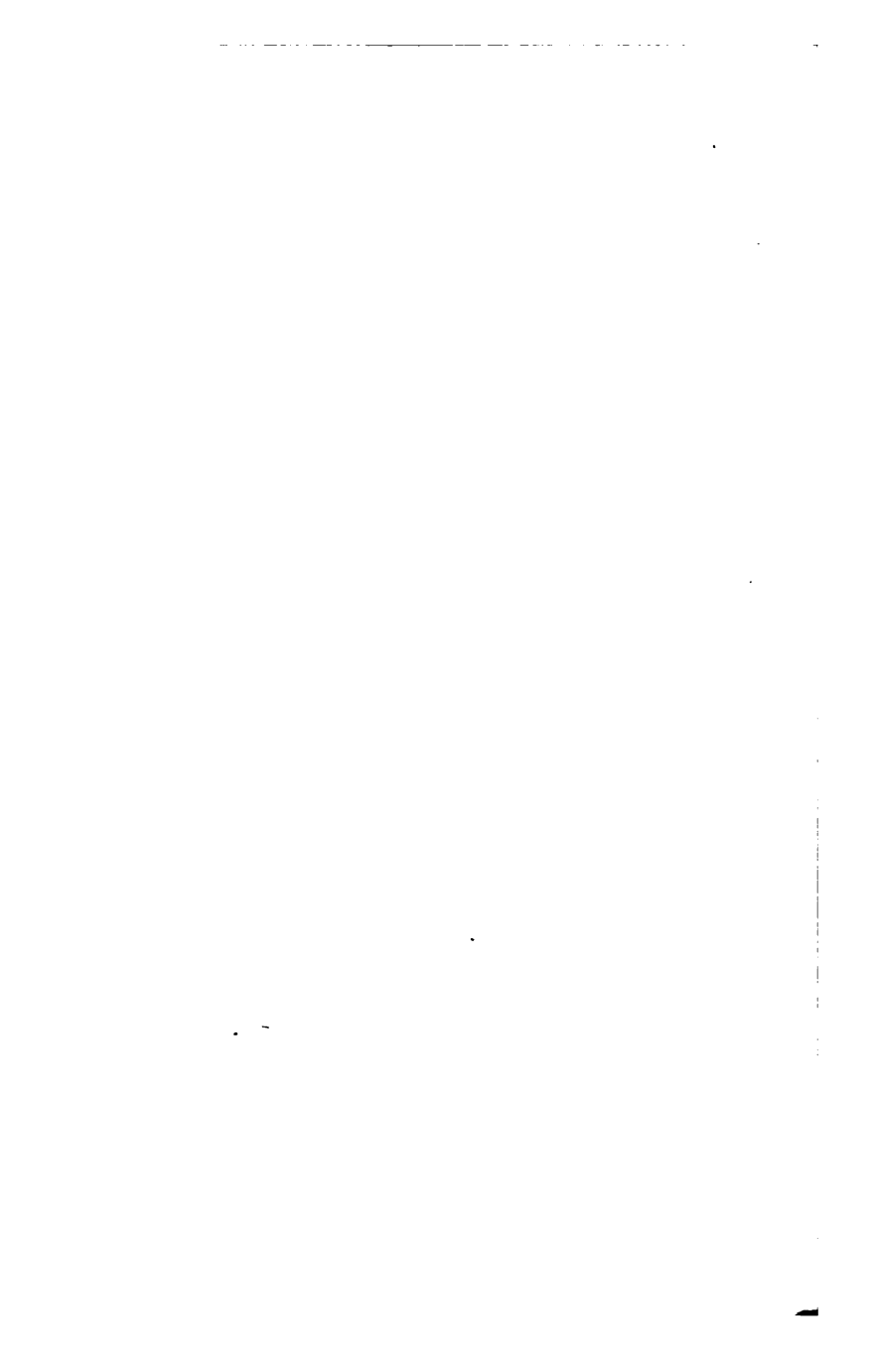
RULE 27. *Classification of Circumstantial Evidence.* 124 Cumstantial Evidence may be classified, in view of the nature of the inference as shown by experience, first, according to the kind of *factum probandum*, i. e. the proposition of fact which is to be evidenced by it; and, next, according to the *a priori* or *a posteriori* process of the inference. The following classes thus are formed:

Fact to be evidenced:

- I. A Human Act; or
- II. A Human Quality or Condition; or
- III. A Quality, Condition or Event of Inanimate Nature.

Process of Inference:

- A. Prospectant (e. g. character before an act);
- B. Concomitant (e. g. alibi at the time of an act);
- C. Retrospectant (e. g. traces left by the act).



SUB-TITLE I:
EVIDENCE OF THE DOING OF A HUMAN ACT

TOPIC I: PROSPECTANT EVIDENCE

RULE 28. *Classification of Prospectant Evidence.* Evidentiary facts raising a prospectant inference of the probable subsequent doing or not-doing of a human act may be classified under the following groups, so far as specific rules of evidence have been laid down under the general principle of Rule 25 (*ante*, § 118):

- A. Character, Disposition;
- B. Physical Capacity, Strength, Skill;
- C. Habit, Custom;
- D. Emotion, Motive;
- E. Design, Plan, Intention.

SUB-TOPIC A:
CHARACTER OR DISPOSITION, AS EVIDENCE OF A HUMAN ACT

1. Preliminary Discriminations

RULE 29. *Character, distinguished from Reputation and from Conduct.* The rules which declare whether character is admissible to evidence a human act as a *factum probandum* assume that actual disposition is the evidentiary fact, and hence are separate and independent of the following rules:

Par. (a). A rule which declares whether a *reputation* is admissible, under the Hearsay rule, to evidence the actual character when it becomes in its turn a *factum probandum*. — (W. § 52.)

Cross-reference. This is Rule 147 (*post*, §1050).

Illustration. The honest character of a defendant in a trial for robbery is always relevant and admissible in his behalf;

but his reputation may not be admissible to evidence that character unless the reputation was formed at the place of residence of the defendant.

129 *Par. (b).* A rule which declares whether *particular instances of conduct* are admissible to evidence the actual character as a *factum probandum*. — (W. § 53.)

Cross-reference. These are Rules 43-49 (*post*, §§ 218-239).

Illustration. In a prosecution for robbery, the defendant having offered his alleged good character as to honesty, the prosecution may introduce his alleged bad character as to honesty; the actual character is relevant and admissible, but neither party may evidence it, as a *factum probandum*, by particular instances of conduct.

130 *Par. (c).* A rule which declares whether a *reputation of character* is admissible to evidence the *belief, motive, or other mental condition of another person* as a *factum probandum*. — (W. § 69.)

Cross-reference. This is Rule 62, *post* (§ 277).

Illustration. In an action for malicious prosecution, the plaintiff's bad repute as a thief may be offered, not as evidence of the guilt of the plaintiff in the original prosecution, but as evidence of the now defendant's honest belief as justifying him in prosecuting.

2. Character as evidentiary of an Act

131 **RULE 30. Defendant's Character in a Criminal Case.** The moral character of a defendant in a criminal case is relevant to evidence that he did or did not do the act charged; and is admissible, with the following exceptions and qualifications: — (W. § 55.)

132 **ART. 1. Kind of Character.** The kind of character relevant is the specific moral trait which in human nature is related to the act charged; — (W. § 59.)

Illustrations. On a charge of rape, the character offered must be the disposition as to chastity; but on a charge of larceny, the character offered must be the disposition as to honesty.

133 [*Par. (a).* Except that a defendant may offer his general goodness of character, subject to Art. 4 (*post*, § 137).]

134 *Par. (b).* And *except* that, when the defendant becomes a witness, his character as a witness may be used, according to the provisions of Rule 97, Art. 2 (*post*, § 502).

135 ART. 2. *Time and Place of Character.* The character that is relevant is the character existing at the time of the act charged; but to evidence this character as a *factum probandum*, the character at a prior or subsequent time, and while in a different place, is relevant, provided the time is not so remote as to make it probable that it has changed.

Distinction. To evidence such character at a different *place*, the reputation offered must be in the community at *that place*; and to evidence such character at a subsequent *time*, the reputation offered may be improperly affected by rumors of the act charged: hence the rules for reputation (Rule 147, Art. 4, *post*, § 1071) may prevent the use of reputation and thus indirectly exclude the character.

136 ART. 3. *Defendant's Use of his Character.* The defendant may introduce his character in any criminal case, irrespective of the kind of offence charged, and irrespective of the strength of the evidence offered against him, and irrespective of whether the doing of the act charged is actually in dispute. — (W. § 56.)

Distinction. Whether the *jury should be told* that good character, when admitted, should be given weight necessarily, or should of itself suffice to create a reasonable doubt, is sometimes discussed. To lay down a rule for the jury on these subjects is to violate the fundamental principle of Rule 5, Art. 4 (*ante*, § 15).

137 ART. 4. *Prosecution's Use of Defendant's Character.* On the principle of preventing Undue Prejudice (Rule 166, *post*, § 1390), the prosecution may not introduce the defendant's character against him, except for the purpose of rebuttal when his character has been already offered in his own behalf. — (W. §§ 57, 58.)

(Reason and Policy. This rule rests on the likelihood that the jurors are apt to be influenced by a defendant's bad character to find him guilty irrespective of an actual belief in that guilt. — The determination to avoid violating this rule leads Courts to a strict interpretation of rules admitting other kinds of evidence under this Topic.)

Distinctions. (1) Distinguish the right of the prosecution to use the defendant's character *as a witness*, under Art. 1, Par. (b), *supra*.

(2) Distinguish the question whether, from the defendant's *failure to introduce* his own character, the prosecution may draw the inference that the character is bad, under Rule 118, Art. 6 (*post*, § 658).

138 RULE 31. *Character of Complainant in Rape, etc.* In any prosecution or action involving in the issue an unchaste act by a man against a woman, where the willingness of the woman is material, the woman's character as to chastity is admissible to show whether or not she consented to the man's act. — (W. § 62.)

Illustration. In a prosecution for *rape*, or for *enticement to prostitution*, or in an action or prosecution for *indecent assault*, the woman's character as to chastity is admissible; but not in a prosecution for *rape under the age of consent* (statutory rape).

Distinction. (1) Whether the character may itself be evidenced by *particular acts of unchastity*, with either the defendant or other men, involves the further rule about particular acts (Rule 47, *post*, § 229).

(2) Whether the woman *as a witness* may be impeached by her character for unchastity, involves the rule for impeachment of witnesses (Rule 98, Art. 1, *post*, § 519).

(3) Whether in *bastardy* the woman's character makes other paternity probable, involves Rule 39, Art. 3 (*post*, § 191.)

(4) Whether in *rape*, the woman's willingness may be evidenced by particular acts involves Rule 67 (*post*, § 329).

139 ART. 1. *Woman's Good Character.* The woman's good character as to chastity is here [not] admissible even though it is not yet disputed by the man.¹ — (W. § 62, n. 1.)

140 ART. 2. *Prostitution.* Habits as a prostitute are equivalent to unchaste character. — (W. § 62, n. 2.)

Distinction. Here it is necessary to distinguish between habitual prostitution and particular acts (Rule 47, *post*, § 229).

141 RULE 32. *Character of Deceased in Homicide.* When on a trial involving homicide or other violence an issue of self-

¹ The few rulings accept the bracketed word, but are unsound.

defence arises, and it thus becomes a material question whether the deceased or other injured person was the aggressor, his character as to violence or the opposite is admissible as evidence of his probable conduct. — (W. § 63.)

ART. 1. *Civil Cases*. This rule is [not] applicable in civil 142 cases.¹ — (W. § 64).

ART. 2. *Rebuttal*. This rule is applicable in favor of 143 the prosecution [provided the defence has first introduced such evidence].² — (W. § 63.)

ART. 3. *Overt Act*. Where the defence introduces such evi- 144 dence, it must be accompanied or preceded by some overt act or other fact evidencing the deceased's aggression at the time; the sufficiency of which is for the trial Court to determine under Rule 18, Art. 3 (*ante*, § 52).³ — (W. § 63.)

ART. 4. *Communication*. It is not necessary that the 145 character as offered should have been known to the deceased.⁴

Distinctions. (1) Distinguish the rule for using the deceased's character to show the defendant's *state of mind as to belief* (Rule 62, *post*, § 278), by which the character must be known to the defendant.

(2) Distinguish the rule for using the deceased's *specific acts of violence, or threats*, to show the defendant's state of mind as to *apprehension of violence* (Rule 62, *post*, §§ 279, 280) or to show the *deceased's character* (Rule 45, *post*, § 226).

Cross-reference. For the deceased's *threats* as evidence of his probable conduct, see Rule 37, *post*, § 182.

RULE 33. *Character of Parties in Civil Causes*. In civil 146 causes, on an issue whether a certain act was done or not, the person's character is not admissible as evidence of his probable doing or not doing of the act; subject to the following exceptions and qualifications: — (W. § 64.)

(*Reason*. This general rule rests chiefly upon the reasons that the doing of an act material to a civil cause of action has

¹ Some Courts insert the "not," but incorrectly.

² Most Courts insert the proviso, but this is unwise.

³ This rule is the same as for communicated character, under Rule 62 (*post*, § 278).

⁴ This distinguishes the present Rule from Rule 62 (*post*, § 278).

rarely any moral quality (*e.g.*, the making of a contract, or the breach of it), nor is the moral intent of it material; so that the person's moral character is not relevant. Moreover, the other circumstances involved are usually so varied and much more important that the parties' character would usually be of slight value, and would merely serve to confuse the real issues. — The inclination to avoid violating the present rule leads also to a strict interpretation of other rules admitting evidence under this Topic.)

[ART. 1. *Sundry Cases involving Moral Traits.* Wherever
147 the moral quality of an act is marked, and the act is of great importance in the issue, the person's character, relevant to the act, is admissible as evidence of his probable conduct;]¹ [and the application of Rule 32, Art. 1 (*ante*, § 142) to civil cases falls under this head.] — (W. §§ 64, 68.)

Illustrations. In an action involving the wilful burning of property insured, or the forgery of a will, or adultery as ground for divorce, or actual fraud by a debtor, the person's character should be admissible. But in an action of *assumpsit* for money had and received or for goods not delivered according to sample, or of trespass for cutting trees, or of trover for goods taken by constructive fraud on creditors, the person's character should not be admissible.

ART. 2. *Negligent Acts.* Where the issue involves a
148 negligent act, whether by the plaintiff or by the defendant or by a third person (such as an employee), the person's character as to negligence or the opposite is [not] admissible as evidence of his probable conduct; [provided there were no eye-witnesses of the conduct].² — (W. § 65.)

Distinctions. Distinguish the questions (1) whether a *habit* of doing an act in a certain way is admissible (Rule 36, *post*, § 170);

(2) whether, if negligent character is for any purpose provable, the person's *particular acts* of negligence are admissible for the purpose (Rule 46, *post*, § 228);

(3) whether an *employee's negligent reputation* or *negligent acts* are admissible to show his *employer's knowledge* of the employee's incompetence (*post*, Rule 62, §§ 281, 282) or as

¹This broad rule, though it formerly was, is not now the law in most jurisdictions; but there is an increasing tendency to recognize it.

²The negative of the above rule is the law in most jurisdictions; and even where the affirmative form is accepted, the eye-witness proviso is usually found.



a part of the issue in a fellow-servant case (Rule 34, *post*, § 161).

(4) whether *intoxication* or *intemperance* is admissible (Rule 35, *post*, § 168).

Illustrations. (1) In an action for injury to the plaintiff while driving around a freight-car of the defendant obstructing the crossing of a highway, an issue of fact being whether the highway was at the time so obstructed, the defendant's negligent practice in so obstructing it is admissible, either under the present rule, or under Rule 36 (*post*, § 170); but separate instances of such obstruction would be inadmissible under Rule 46 (*post*, § 228).

(2) In an action for injury to the plaintiff's horse by a collision with the defendant's wagon in the highway, the careful or careless character of the defendant, the wagon-driver, may be admissible to show his probable conduct, under the above rule; yet particular prior acts of his may be inadmissible to evidence that character, under Rule 46 (*post*, § 228).

(3) In an action for injury done by a railroad train, thrown from the track by a misplaced switch, the switchman's negligent or careful character is admissible under the present rule; and if the plaintiff is an employee and the fellow-servant rule applies, the switchman's character is in any event admissible under Rule 34 (*post*, § 161), as being a part of the issue, and particular instances of his negligent conduct may be admissible under Rule 62 (*post*, § 282), to show the employer's knowledge.

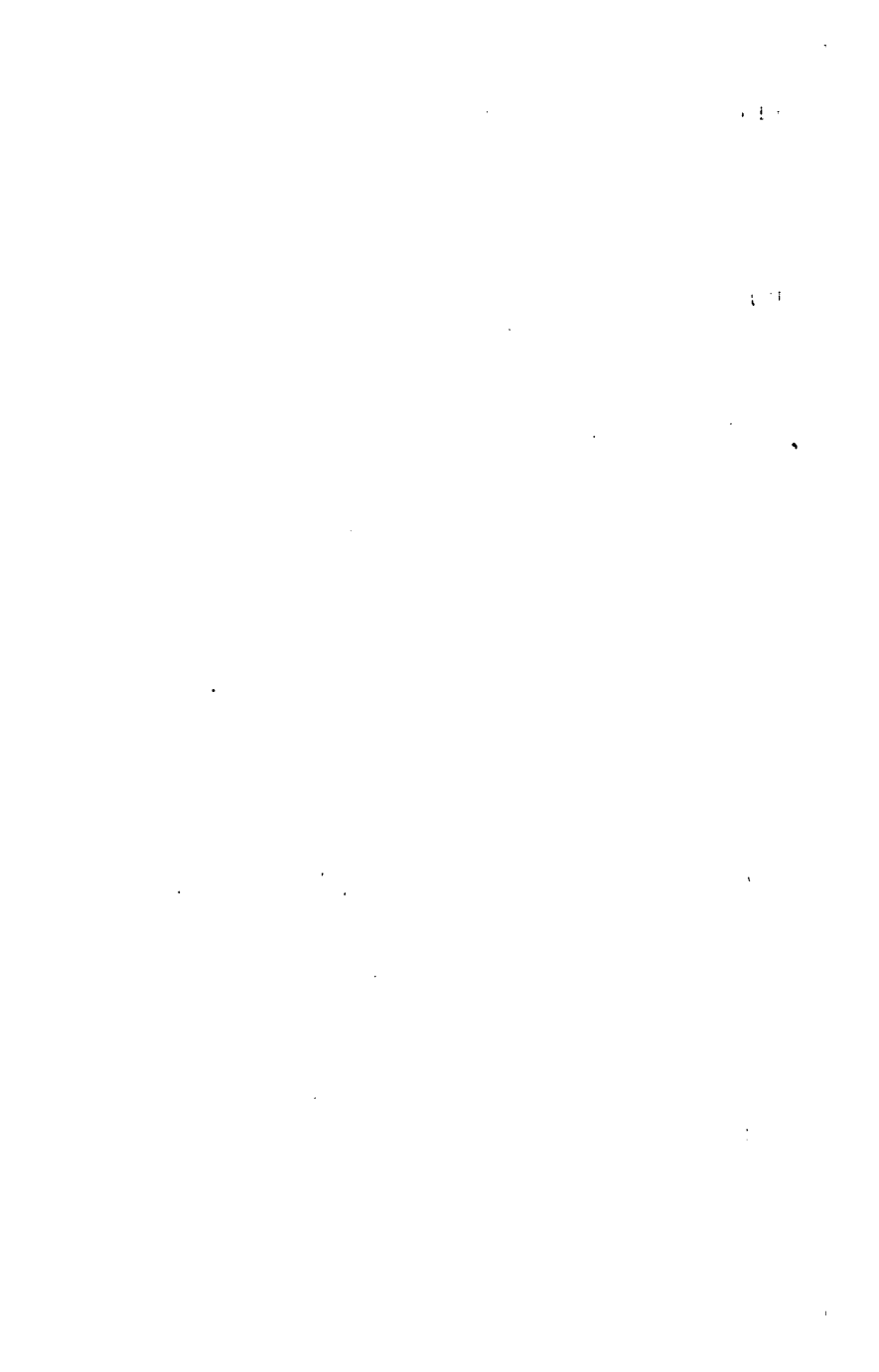
[ART. 3. *Plaintiff Defamed.* In an action for defamation 149 by an utterance charging the plaintiff with a criminal act, on a plea of truth the plaintiff's character is admissible as if he were a defendant in a criminal case, on the conditions specified in Rule 30 (*ante*, §§ 130-137).]¹ — (W. § 66.)

Distinctions. Distinguish (1) the rule as to using the plaintiff's character when *in issue in mitigation of damages* (Rule 34, *post*, § 154);

(2) the rule as to using *specific acts of misconduct* by the plaintiff *in mitigation of damages*, or as a part of the issue on a *plea of truth* where the utterance charges a specific act (Rule 49, *post* §§ 236, 239).

Illustration. In an action for slander charging the plaintiff with having received a piano knowing it to be stolen, and a plea of truth, the plaintiff may introduce his character for honesty, and until then the defendant may not introduce the plaintiff's character. But on an issue of mitigation of damages, the defendant may introduce the plaintiff's

¹ Only a few jurisdictions have definitely accepted this rule.



character, under Rule 34 (*post*, § 154). Moreover, if the charge were that the plaintiff habitually received stolen goods knowingly, on a plea of truth the defendant could introduce specific instances, as a part of the issue, under Rule 49 (*post*, § 236).

ART. 4. *Defendant in Malpractice.* In an action involving
150 the unskilful doing of an act by a physician or other person engaging to act skilfully, the person's character as to skill or the opposite is admissible as evidence of his probable conduct, [subject to the conditions applicable to a defendant's character in a criminal case, under Rule 30 (*ante*, §§ 130-137).]¹ — (W. § 67.)

Distinctions. Distinguish (1) the rule allowing the use of such character for skill when it is in issue under the pleadings (Rule 34, *post*, § 163); since this is usually the case, the above rule seldom has an opportunity for independent application;

(2) the rule as to *particular acts* of unskilfulness (Rule 46, *post*, § 228, Rule 50, § 242).

[ART. 5. *Third Persons.* The foregoing rules of Articles
151 1 to 4 are equally applicable where the act to be evidenced is that of a third person not a party to the action.]² — (W. § 68.)

Illustrations. This rule might admit the character of a third person in the following cases: In *divorce for adultery*, the character of the co-respondent for chastity; in *bastardy*, the character of another putative father for chastity; in *probate* of a will, the character of the alleged forger for honesty.

ART. 6. *Animals.* In an action involving the conduct of
152 an animal, the animal's character as to the appropriate trait is admissible as evidence of its probable conduct. — (W. § 68.)

Distinctions. Distinguish (1) the use of the animal's character when *in issue* as to the owner's *scienter* (Rule 62, § 283).

(2) the use of *particular acts* of the animal to evidence its character (Rule 48, *post*, § 230), or to evidence the owner's knowledge (Rule 62, *post*, § 283).

3. Character as an Issue in the Case

RULE 34. *Character in Issue, as Mitigating Damages, as a*
153 *Substantive Excuse, or Otherwise.* Wherever by any rule of

¹ There is here little authority; the clause as to the rule in criminal cases seems prudent.

² No Court states the rule so broadly. But many Courts have recognized various instances of it.

substantive law, including the law of damages, and subject to the rules of pleading, the character, whether actual or reputed, of any person, whether a party to the action or not, is material, it may be proved, as a fact in issue, though it cannot be used as evidence of any other fact except so far as is allowed by the foregoing Rules 30-33 (§§ 130-152).¹

Distinctions. Distinguish the questions (1) whether *reputation* is admissible to evidence such character, when actual character is to be evidenced (Rule 147, Art. 4, *post*, § 1071);

(2) whether *particular acts* of misconduct are admissible to evidence such character (Rule 49, *post*, §§ 232-239).

(3) whether the *reputed character* is admissible as evidence of *knowledge, reasonable belief*, or the like, by the defendant (Rule 62, *post*, §§ 278-288).

ART. 1. *Mitigation of Damages.* In the following classes of actions, the rules of substantive law and of damages and of pleading may regard the reputed character of a person as material in mitigation of damages:

155 *Par. (a).* In an action for *defamation*, the reputed character of the plaintiff.² — (W. §§ 70-74.)

156 *Par. (b).* In an action for *breach of marriage-promise*, or for *malicious prosecution*, or for *indecent assault*, the plaintiff's reputed character; and in an action for *seduction* of a daughter or a spouse, the plaintiff's actual character. — (W. § 75.)

157 *Par. (c).* In an action for *seduction* of a daughter or a spouse, the reputed or the actual character of the daughter or spouse; and in an action for *death*, the actual character of the deceased so far as involving his earning capacity. — (W. § 75.)

Distinction. The *crime* of *seduction*, and woman's *statutory action*, must here be distinguished (*infra*, § 160).

158 *Par. (d).* But in all of the foregoing classes of cases the rules of pleading may exclude the good character of the

¹ A Code of Evidence should not attempt to include the rules of this sort, but merely to distinguish them from its own rules; accordingly, no statement of the tenor of the precise rule is here offered for any of these classes of cases.

² Here much turns on the rules of pleading; there is also a question as to the kind of character in issue, and as to rumors being equivalent to reputation.

person, offered in his behalf, until the defendant disputes it. — (W. § 76.)

ART. 2. *Excuse*. In the following classes of actions, the rules of substantive law may regard the character, actual or reputed, of some person, as coming in issue to fix or to remove the defendant's liability:

160 *Par. (a)*. In breach of marriage-promise, or of employment-promise, the plaintiff's actual character, as exonerating the defendant. — (W. § 77.)

161 *Par. (b)*. In tort against an employer, the employee's character for competence, as fixing the defendant's liability to a fellow-servant. — (W. § 80.)

Distinctions. Distinguish here the use of the employee's (1) *reputed* character, or (2) *particular acts*, to show the employer's knowledge (Rule 61, *post*, §§ 281, 282).

ART. 3. *Sundry Issues of Character; Bawdy-house, Gambling-house, Criminal Seduction*. In the following issues, the substantive law may regard the actual or reputed character of a person or place as being a part of the issue:

163 *Par. (a)*. In a prosecution for keeping a bawdy-house, the actual or reputed character of the house or of the persons frequenting it. — (W. § 78.)

Distinctions. Distinguish here (1) the use of *reputation* as evidence of actual character (Rule 47, Art. 4, *post*, §1071); (2) the use of *particular acts* as evidence of actual character (Rule 49, *post*, § 233).

164 *Par. (b)*. In a prosecution for keeping a gambling-house, the actual or reputed character of the house or of the persons frequenting it. — (W. § 78.)

Distinction. Distinguish here the use of *reputation* as evidence of the actual character (Rule 47, Art. 4, *post*, §1071).

165 *Par. (c)*. In a prosecution for seduction, or a civil action (under statute) by the woman for seduction, the actual or reputed character of the woman.¹ — (W. § 79.)

¹ The terms of the statutes vary as to making reputed or actual character the issue.



Distinctions. Distinguish (1) the use of *reputation* as evidence of actual character (Rule 147, Art 4, *post*, § 1071);

(2) the use of *particular acts* of unchastity as evidence of actual character (Rule 49, *post*, § 234);

(3) the use of *particular acts* of unchastity to *impeach the woman as a witness* (Rule 105, *post*, § 549), or to evidence her *willingness* (Rule 67, *post*, § 329.)

SUB-TOPIC B:

PHYSICAL CAPACITY, SKILL, OR MEANS, AS EVIDENCE OF A HUMAN ACT

167 **RULE 35.** *Physical Capacity, Skill, or Means.* Whenever the doing or not doing of a human act by a person is material to be proved, his possession or lack of suitable corporal or mental capacity, or technical skill, or mechanical means or tools, is relevant and admissible. — (W. § 83.)

168 **ART. 1.** *Strength, Skill, Intoxication, Tools, etc.* The general principle applies to sundry varieties of human strength, intoxication, skill, possession of means, and the like. — (W. §§ 84-88.)

Illustrations. (1) A holographic will is offered, and its genuineness is disputed; the alleged testator's illiteracy is admissible as evidence that he did not write it.

(2) In a prosecution for homicide, the defendant's condition of physical incapacity by intoxication, at the time of the killing, is admissible as evidence that he did not do it.

(3) On a charge of forgery of government money, the fact that the defendant was in possession of peculiar dies and chemicals, suited to the making of such money, is admissible; but not his character as an habitual forger.

Distinctions. (1) Distinguish the *character* rule, which will often exclude the use of such evidence in criminal cases (Rule 30, *ante*, § 137) or in civil cases (Rule 33, *ante*, § 148), if the evidence emphasizes rather the moral character of the person than his physical or technical capacity.

(2) Distinguish the rule against *particular acts* evidencing character (Rules 43-48, *post*, §§ 218-230), which in the same way may exclude such evidence.

(3) Distinguish the rules for using *habit* or *custom* (Rule 36, *post*, § 170) and for *design* or *plan* (Rule 37, *post*, 137) which however may equally serve to admit such evidence in some aspects.

(4) Distinguish the rule for using *traces* as evidence of *identity* (Rule 41, *post*, § 196), which may equally serve to admit such evidence in some aspects, especially the fact of tools, etc., *after* the doing of the act in question.



ART. 2. *Possession or Lack of Money, as evidencing a Loan,*
 169 *Payment, or the like.* Where the delivery of money or goods as payment or loan or deposit, by a certain person, is material to be proved, the person's possession or lack of such money or goods, at a reasonable time beforehand, may be relevant; but is usually not sufficiently probative to be admissible, except when offered negatively, i. e. his incapacity offered to negative his doing of the act. — (W. § 89.)

Illustrations. (1) In a bill to enforce a resulting trust in lands purchased with money advanced by R in the name of a clerk, R's furnishing of the money being disputed, the clerk's lack of money adequate for the sums paid is admissible.

(2) In an action on a note, and a plea of payment, the maker's possession of money before the time alleged would be relevant, but so slightly probative as hardly to be admissible, unless to rebut the fact of non-possession offered as evidence that he could not have paid.

Distinction. Distinguish the use of such facts as evidence of motive (Rule 67, Art. 3, *post*, § 326) e. g., where the alleged debtor's lack of means is offered to show that the alleged lender would probably not have given him credit; or as evidence of identity by traces (Rule 41, *post*, § 197), e. g. where the defendant's possession of money *after* but not before a larceny is offered to show how he probably obtained it.

SUB-TOPIC C:

HABIT OR CUSTOM, AS EVIDENCE OF A HUMAN ACT

RULE 36. *Habit or Custom.* Wherever a human act or the
 170 manner of doing or not doing an act is material to be proved, the person's habit, or the custom of a class of persons including him, is relevant, providing it involves a fair regularity or frequency of conduct as to the act or class of acts in question. — (W. §§ 92, 93.)

Distinctions. (1) Distinguish the character-rule, which is sometimes (though too strictly) made to exclude such evidence, in criminal cases (Rule 30, *ante*, § 137) and in civil cases (Rule 33, *ante*, § 148), if the moral character is emphasized.

(2) Distinguish the rule against *particular acts* evidencing character (Rule 46, *post*, § 228) or habit (Rule 66, *post*, § 316), which may sometimes exclude such evidence if offered so as to emphasize the separate acts rather than the general

(3) Distinguish the rule for *aiding memory* by a record of past recollection verified by habit (Rule 59, Art. 2, *post*, § 433).¹ — (W. § 98.)

Illustrations. (1) Action against a collector for moneys received but not handed over; the business habit of the parties to deliver and receive at a stated time weekly the sums collected is admissible.

(2) Action on a contract made by telegrams; the originals being called for, and their destruction thus being a material fact, the habit of the telegraph company to destroy all telegrams on file at the end of six months is admissible.

(3) Action for death caused by a railroad train at a crossing; the deceased's habit of slacking the speed of his horse when approaching the crossing is admissible; unless this be treated as character-evidence governed by Rule 33 (*ante*, § 148).

(4) In a prosecution for forgery, the defendant's habitual attempts to imitate the signatures of other persons are not admissible under the present rule, partly because a regularity of habit can hardly be found in such an offer, and partly because the offer may be interpreted as involving the defendant's moral disposition to forge; yet if restricted as an offer of the defendant's technical skill and capacity to imitate (Rule 35, *ante*, § 168), it is admissible, especially as it is thus essentially only a rebuttal of the presumable incapacity of the ordinary person to imitate signatures successfully.

ART. 1. *Sundry Applications.* The foregoing rule applies
171 to admit a habit or custom of the following sorts:

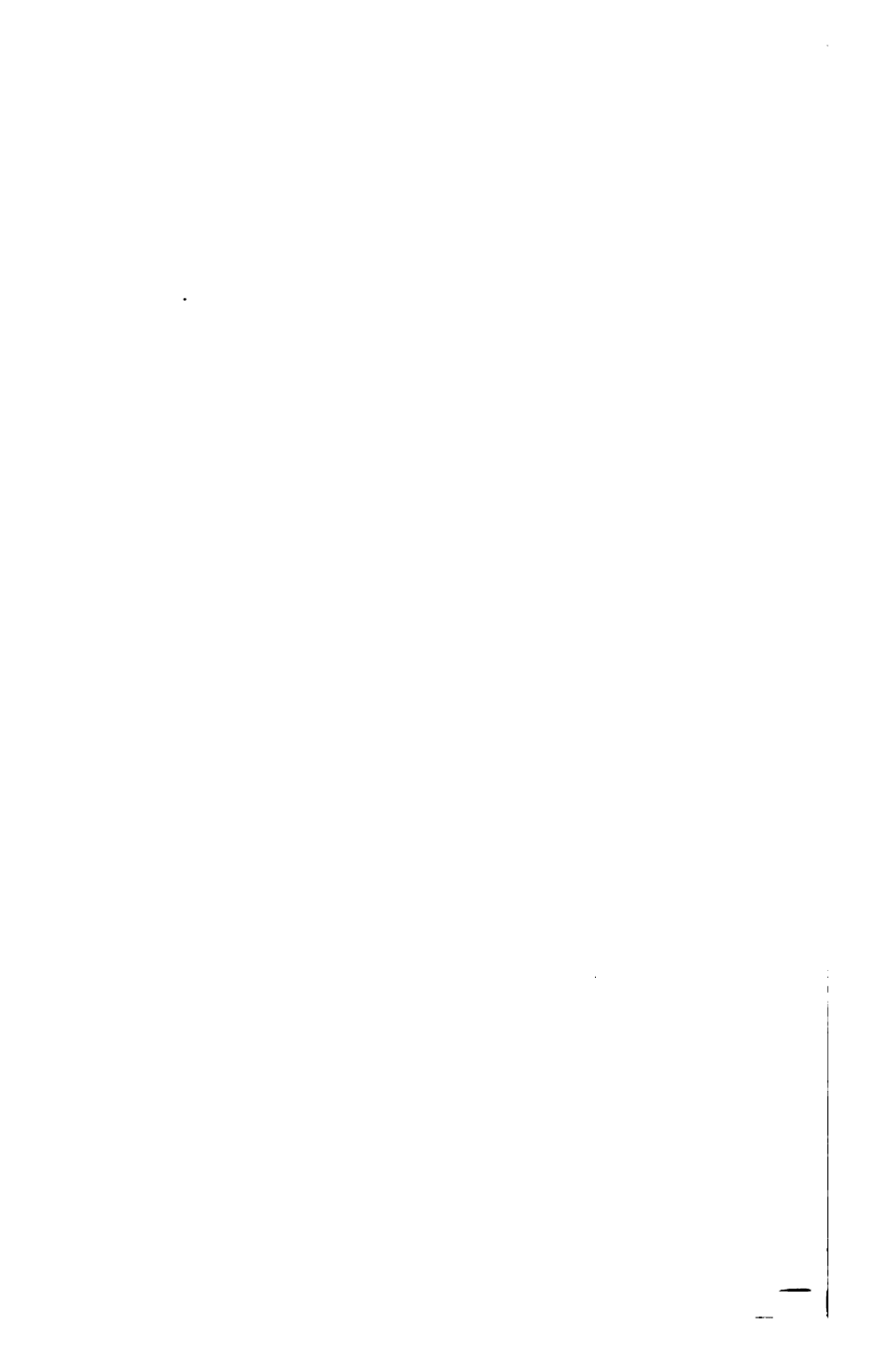
Par. (a). A habit or custom as to *making contracts* or *authorizing an agent's acts*, as evidence of the doing of a specific act of the sort. — (W. § 94.)

Distinction. Here the usual sort of evidence offered is not a general or uniform habit, but particular instances of similar transactions, which then fall under Rule 66 (*post*, § 316).

Par. (b). A custom of the Government *post-office* department, or of a public *telegraph* servant, as evidence that
172 a letter or telegram properly addressed, prepaid, and deposited, was delivered to the addressee. — (W. § 95.)

Distinction. (1) Here, since the custom is judicially noticed to exist (Rule 230, *post*, § 2135), no formal offer of proof of it is needed.

¹ In such cases the person sometimes speaks to his habit, without using a memorandum (chiefly *notaries* and *attesting-witnesses*); the present rule may then be invoked.



(2) Whether letter or message thus received is *presumed genuine* involves a Rule 191 (*post*, §§ 1625, 1626).

(3) Whether the *postmark* is evidence of the time and place of mailing involves Rule 41 (*post*, § 199).

173 *Par. (c).* A habit of *temperance* in or *abstinence* from *intoxicating liquor*; but not an intemperate use of intoxicating liquor, unless it is of marked regularity or continuance. — (W. § 96.)

Distinctions. (1) Distinguish the use of *particular instances* of intoxication, as evidence of the habit (Rule 66, *post*, § 316), or as evidence of an employer's knowledge (Rule 62, *post*, § 282).

(b) Distinguish the use of intemperance as a fact in issue constituting an *employee's incompetency*, under the fellow-servant rule.

174 *Par. (d).* A habit of doing or not doing a *negligent* or a *careful act*. — (W. § 97.)

Distinction. Here, if the evidence is offered merely as a habit, the negligent or careful quality of the act being otherwise established, it avoids the risk of violating the rule against using moral character (Rules 30, 33, *ante*, §§ 137, 148), which however is applied nevertheless by some Courts.

175 *Par. (e).* A habit of *writing* or *spelling* in a certain manner, as evidence of the authorship of a document.

Cross-reference. The mode of evidencing such a habit by *specimens* (Rule 177, *post*, § 1488), or by *expert opinion* (Rule 177, *post*, § 1480) or by *lay opinion* (Rule 177, *post*, § 1466) is what usually gives rise to question in the use of this principle, which is itself undoubted.

176 *Par. (f).* A custom of *officials* to perform their duty, as evidence that it was performed in a given instance.

Cross-reference. This is unquestioned, and has even given rise to a rule of presumption (Rule 228, *post*, § 2088).

SUB-TOPIC D:

DESIGN OR PLAN, AS EVIDENCE OF A HUMAN ACT

177 **RULE 37.** *Design, Plan, Intention.* Wherever a human act or the manner of doing an act is material or relevant to be proved, the person's design or plan or intention as to that act, or as to a class of acts including it, is admissible, provided the time intervening was not so long as to make its abandonment probable. — (W. §§ 102-104.)

Distinctions. (a) As evidence of this design or plan, the person's *declarations* may be offered; these must therefore satisfy either the rule for a *party's admissions* (Rule 115, *post*, § 630) or the hearsay exception for *declarations of a mental state* (Rule 153, *post*, § 1200); those rules are here assumed to be satisfied.

(b) As evidence of this design or plan, the person's *conduct* may be offered, under Rule 59 (*post*, § 266), and especially his *other similar criminal acts* under Rule 65 (*post*, §§ 297-314) or *contractual acts* under Rule 66 (*post*, § 316); such rules are here assumed to be satisfied.

(c) Distinguish the *intent accompanying an act* (Rule 60, *post*, § 271) from the plan or intention as evidence of the doing of an act.

Illustrations. In a prosecution for fraudulently evading payment of fare on a railroad train, a question being whether the defendant was on the train at the time, his plan to ride upon that train is relevant; and to evidence the plan, his declarations of intention are relevant both as a party's admissions and under the hearsay exception; but on the question whether his failure to pay was fraudulent, former acts of evasion of payment when riding may not be admissible, under Rule 65 (*post*, §301) as evidence of either plan or intent.

ART. 1. *Threats of a Defendant.* Under the foregoing principle, the threats of a defendant are admissible as evidence of his doing the act charged; with the following qualifications and distinctions:— (W. §§ 105-110.)

Par. (a). The threat need not specify the precise act in question, provided it applies to such a *class of acts*.

Distinction. Even where the threat is not definite enough, as such, under the present rule, it would often be admissible as an expression of hostility, under Rule 67, Art. 6 (*post*, § 329).

179 *Par. (b).* If the threat is *conditional* or contingent in form, the prosecution must show whether the condition or contingency was fulfilled.

180 *Par. (c).* A *lapse of time* between the utterance of the threat and the doing of the act charged does not of itself make the threat inadmissible.

181 *Par. (d).* The defendant may introduce any facts which tend to *explain away* the significance of the threat.

Distinction. The threats of a *co-defendant* or *co-indictes* are excluded by the hearsay rule, as against this defendant,

unless they are receivable as admissions of a co-conspirator (Rule 121, Art. 2, *post*, § 687).

ART. 2. *Threats of the Deceased in Homicide.* Wherever
182 homicide or other assault is involved and the fact of self-
defence is in issue, and a question thus arises whether the
deceased or other injured person was the aggressor, his threats
against the defendant are relevant, subject to the following
qualifications and distinctions (in addition to those of Art.
1 as applied to this class of threats):¹ — (W. §§ 110, 111.)

Par. (a). They are not admissible, if there is clear evidence that the defendant was the aggressor;

Par. (b). They are not admissible unless there is other appreciable evidence of the *deceased* or *injured person's aggression*, or unless there were no eye-witnesses of the affray;

Par. (c). They are admissible even though *not known* at the time to the defendant;

Par. (d). They are admissible in a *civil* as well as in a criminal case.

Par. (e). The trial Court's ruling is *final*, under Rule 18 (*ante* § 52,) on the facts required in *par. (a)* and *par. (b)*.

Par. (f). The prosecution may in *rebuttal* introduce the deceased or injured person's peaceable intention.

Distinction. The use of *communicated threats*, to evidence the defendant's reasonable apprehensions, under Rule 62 (*post*, § 279) imposes a condition not required by *Par. (c) supra*.

ART. 3. *Deceased's Intention of Suicide.* On an issue of
183 homicide, the question being whether the deceased killed himself, the deceased's intention of suicide is admissible; subject to the qualification of Rule 40 (*post*, § 194.)

Cross-reference. The present rule offers here no obstacle; but the rule of § 194, *post*, is sometimes thought to impose conditions. The hearsay exception for declarations of a mental condition is also involved (Rule 153, Art. 2, *post*, § 1207.)

¹ The details of the rule vary somewhat in the different jurisdictions.

...the ... of ...

...the ... of ...

...the ... of ...

...the ... of ...

...the ... of ...

...the ... of ...

...the ... of ...

...the ... of ...

...the ... of ...

...the ... of ...

...the ... of ...

...the ... of ...

...the ... of ...

...the ... of ...

...the ... of ...

ART. 4. *Testamentary and Contractual Plans.* Wherever
184 the question is whether a will, or a will of specific contents,
was executed or revoked or altered, or whether a gift or
contract or transfer was made; the person's prior expressions
of plan or design as to the matter in question are admissible.
— (W. § 112.)

Illustration. In probate proceedings, the alleged will being
lost, and its execution being otherwise evidenced, the con-
tents of the will may be evidenced by the decedent's instruc-
tions to his attorney as to the tenor of his will.

Distinctions. (1) For *wills*, the usual controversy is over
post-testamentary utterances, which involve other principles
(Rule 153, Art. 4, *post*, § 1218).

(2) For *contracts*, the design or plan is usually desired to be
evidenced by *specific instances* of other similar contracts, thus
raising a different question Rule 66 (*post*, § 316).

SUB-TOPIC E:

EMOTION OR MOTIVE, AS EVIDENCE OF A HUMAN ACT

RULE 38. *Motive in general.* Whenever the doing or not
185 doing of a human act is material or relevant to be proved,
the person's emotional condition as impelling him towards or
against that act or class of acts is relevant. — (W. §§ 117, 119.)

ART. 1. *Evidence to prove Motive.* The person's emotional
186 condition, or Motive, may be evidenced

(a) by external circumstances adapted to stimulate it,

(b) or by his conduct or words expressing it,

(c) or by its prior or subsequent existence.

All rules of Evidence as to Motive concern this process of
evidencing it, and are therefore stated under that head
(Rule 67, *post*, §§ 322-331).

ART. 2. *Evidence of Motive not essential.* In no case is it
187 essential that a person's motive for an act shall be ascer-
tained or evidenced; but the apparent absence of the specific
appropriate motive may be treated as evidence to negative
the doing of the act. — (W. § 118.)



TOPIC II: CONCOMITANT EVIDENCE OF A HUMAN ACT
(OPPORTUNITY, ALIBI, THIRD PERSON'S GUILT, ETC.)

SUB-TOPIC A: OPPORTUNITY

RULE 39. *Opportunity in general; Other Person's Equal*
188 *Opportunity.* Whenever the doing of a human act by a particular person is material or relevant to be proved, the person's opportunity to do it is relevant.

The term 'opportunity' includes all facts of time, place, and personal conduct which make it corporally possible for a given person to have been present and doing the act, and also all facts which make it less possible corporally for some other person to have been present and doing it. — (W. § 131.)

Illustration. On a charge of placing an obstruction on a railroad track, the prosecution may show that the defendant was seen within a mile of the place one hour beforehand, and that no other persons were seen near the place for two hours before or after.

ART. 1. *Exclusive Opportunity not necessary.* It is not
189 necessary under this Rule to show that the party charged as the doer of the act had exclusive opportunity to do it. — (W. § 131.)

ART. 2. *Equal Opportunity for Others.* The party charged
190 as the doer of the act may introduce all facts indicating that one or more other persons had also the opportunity of doing it. — (W. § 132.)

Illustrations. In an action on a note, the party charged as maker, denying the execution, may show that there is another person of the same name who was doing business with the payee; or in a prosecution for arson, the clerk charged, who was in the building on the night of the fire, may show that two other clerks were in the building at the same time.

Distinction. Here the party charged is merely *explaining away* his apparent exclusive opportunity; but under Rule 40 (*post*, § 194) he may also attempt to establish affirmatively that another person was the doer.

ART. 3. *Same: Other Person's Intercourse with Complainant*
191 *in Bastardy, Seduction, etc.* Wherever the paternity of a child is material or relevant to be proved, the party denying a specific paternity may show that about the probable time

the mother had intercourse or improper liberties with another man. — (W. § 133.)

This rule is therefore applicable in the following proceedings:

Par. (a). (1) In a proceeding for *filiation* or charge of *bastardy*;

(2) in an action for a parent's *loss of services* by a daughter's pregnancy;

Par. (b). But not in a charge of *rape*, *incest*, or *adultery*; [except that in such cases, where pregnancy or birth of a child is admitted in evidence under Rule 41 (*post*, § 207), the party charged may rebut its effect by the present kind of evidence].¹

Distinctions. Distinguish the use of other acts of intercourse

(1) to show the woman's *willingness to consent* (Rule 47, *post*, § 229 and Rule 67, § 329);

(2) to *impeach* the *woman's testimonial credit* (Rule 105, Art. 2, *post*, § 552).

Par. (c). And not in an issue of *inheritance*, where the mother is a married woman at the time of birth and the child is alleged to be not that of the husband; except on the conditions permitted by the *presumption of legitimacy* (Rule 228, *post*, § 2080).

SUB-TOPIC B: ESSENTIAL IMPOSSIBILITY

192 RULE 40. *Impossibility of Acts, in general.* Wherever the doing of a human act by a particular person is in issue, the person may show any contemporaneous fact which makes it corporally impossible that he could have been the doer. — (W. § 135.)

Such facts are of two chief sorts:

(1) that the person charged was at the time absent;

(2) that another person did the act.

192a ART. 1. *Alibi of Defendant.* A person charged to have done any act may show any fact making it probable that he was not present at the time and place of the act; and such facts

¹ This last proviso is not conceded by some Courts; but it seems practically fair.

are admissible even though they do not suffice to make his presence totally impossible. — (W. § 136.)

ART. 2. *Non-Access of Husband.* In an issue of inheritance, the party desiring to prove illegitimacy may show that the husband did not physically have access to the wife at the probable time; subject to the conditions of the *presumption of legitimacy* (Rule 228, *post*, § 2080).

ART. 3. *Third Person as Doer of the Act Charged.* A person charged with any act may show in rebuttal that it was committed by a third person, and for this purpose any facts making it probable that the third person did it are admissible, including the threat and the motive of a third person; provided that the total of such facts is determined by the trial Court to be sufficient to go to the jury under the general Rule 226, (*post*, § 2002).¹ — (W. §§ 139-142.)

Illustration. On a charge of murder, the defendant and the deceased had been seen together just before the deceased's death; the defendant may show that the deceased was supposed to have eloped with H's wife and that H had threatened to kill the deceased.

Distinctions. Such evidence must satisfy any other applicable rules, such as the hearsay rule, which might exclude a third person's confessions (Rule 139, Art. 2, *post*, § 968).

ART. 4. *Suicide.* On an issue of violent harm, including issues of death or injury on insurance policies, the self-infliction of the harm may be shown, and therefore any facts making it probable that the harm was self-inflicted; subject to the proviso of Art. 3, *supra*.² — (W. §§ 143, 144.)

Distinctions. Here also the other applicable rules must be satisfied, *e. g.* the hearsay exceptions as to declarations of intention, etc. (*post*, Rule 153, § 1207, *ante*, Rule 37, § 183).

TOPIC III: TRACES OF A HUMAN ACT, AS RETROSPECTANT EVIDENCE OF ITS COMMISSION

RULE 41. *Traces, in general.* Whenever the doing of a human act by a particular person is material or relevant to be proved,

¹ This proviso is in most Courts applied too strictly.

² Here also the proviso is often too strictly applied.



any fact about that person which is such a trace as might reasonably have been left by the doing of the act is admissible; and the absence of such a trace is also admissible to evidence that that person is not the doer of the act. To explain away the presence of such a trace, the person may introduce any facts which make probable some other cause for the existence of the trace. — (W. § 148.)

Such traces may be grouped under three heads: Mechanical, Organic, and Mental.

SUB-TOPIC A: MECHANICAL TRACES

ART. 1. *Miscellaneous Instances.* The presence or absence
197 of clothing, marks, tools, or other substance, upon a person or premises, is a trace admissible under this Rule. — (W. § 149.)

Illustration. On a charge of burglary, the window having been raised by a knife, and a fragment of the blade being left in the window, the presence in the defendant's pocket of the knife fitting the broken blade is admissible. Here the defendant may explain away the fact by showing that he did not possess the knife until two days after the burglary, when he found it in the street.

Distinction. Distinguish the inference as to *identity* (Rule 68, *post*, § 333); *e. g.* the fact that the defendant's gun is found recently discharged is evidence of the present sort; but the fact that the bullet of the defendant's gun is identical or not with the kind of bullet found in the deceased's body involves the inference of *identity*.

ART. 2. *Brands, Timber-Marks, etc.* The presence on an
198 animal, on timber, or on other chattels, of a brand or other mark which a particular person has the custom or the exclusive right to use is admissible to show that that person placed it there, [and that he is the owner of the chattel].¹ — (W. § 150.)

Distinguish the use of the *official register* to show a person's exclusive right to a mark (Rule 148A, *post*, § 1100), and the *presumed genuineness* of the mark (Rule 188, Art. 2, *post*, § 1593).

ART. 3. *Postmark.* The official postmark on an envelope
199 is admissible as evidence that the envelope was passed through

¹ This bracketed clause is sometimes not deemed to be law, except by express statute; but it is sound.

the government mails at the time and place indicated. — (W. § 151.)

Cross-reference. For practical purposes, this rule usually requires the aid of two more, namely, that a purporting post-mark is *presumed genuine* (Rule 191, *post*, § 1624) and that the official mark is admissible as an official statement without calling the officer (Rule 148 C, Art. 5, *post*, § 1151).

ART. 4. *Possession of Chattels taken in a Crime.* Wherever
200 a chattel has been taken, in the doing of a wrongful act, the fact of its subsequent possession is admissible to show that the possessor was the taker, and therefore was the doer of the whole act.

Par. (a). This application of the Rule includes the crimes of larceny, burglary, forgery, robbery, murder, and game-destruction, among others. — (W. §§ 152, 153.)

Distinctions. (a) Distinguish the *presumption of law* based on this evidence (Rule 228, *post*, § 2066).

(b) Distinguish the possession of goods, *e. g.* liquor, as evidence of an *intention to commit a crime, e. g.* to sell the liquor (Rule 59, *post*, § 267).

ART. 5. *Possession of Money.* The possession of money is
201 admissible under this Rule as evidence of the doing of a wrongful act involving the taking of money, provided either (1) that there is some mark of identity of the specific money, or (2) that the possessor lacked such a quantity of money before the time of the act. — (W. §§ 154, 155.)

Distinctions. Distinguish the use of lack of money as evidence of *motive to take* (Rule 67, Art. 3, *post*, § 326) or of *incapacity to pay* (Rule 35, *ante*, § 169).

ART. 6. *Possession of Instrument of Debt.* The possession
202 of an instrument of debt by an obligor after maturity is admissible as evidence of the obligee's voluntary restoration of it amounting to an acknowledgment of discharge of the obligation. — (W. §§ 156, 2518.)

Distinctions. (a) Distinguish the *presumption of law* based on this fact (Rule 228, *post* § 2068).

(b) Distinguish the possession of a *receipt*, which is an admission by the obligee under Rule 115 (*post*, § 630).

ART. 7. *Possession or Existence of a Document, as evidence of*
 203 *Execution, Delivery, or Seisin.* The possession of a document, or its existence in a certain form or place, is admissible for the following purposes:

Par. (a). The existence of a document purporting to be signed or sealed by a particular person is evidence of his execution of it, subject to the special rules for the sufficiency of evidence of authentication of documents (Rules 189-193, *post*, §§ 1595-1643).

Par. (b). The existence of a document in an official record-office, or in the grantee's custody, is evidence of its delivery, subject to the presumption of law applicable thereto (Rule 228, *post*, §§ 2070-71).

Par. (c). The existence of a document of ownership, such as a deed of grant or of lease, is evidence of possession of the property, by the maker of the document, at the time of making it, on an issue of adverse possession in a prior generation. — (W. § 157, par. 4.)

Distinctions. (1) Distinguish the presumption of genuineness of such ancient documents (Rule 190, *post*, § 1608).

(2) Distinguish the use of deeds as verbal acts accompanying an act of possession otherwise proved, to indicate its scope (Rule 155, Art. 2, *post*, § 1245).

ART. 8. *Possession of Property, as evidence of Ownership.*
 204 The fact of possession of property is evidence of the possessor's ownership of it; subject to the presumptions of law applicable thereto (Rule 228, *post*, § 2067).

ART. 9. *Negative Traces: Death, Payment, Lost Will, etc.*
 205 The absence of such traces as would ordinarily exist if an act had been done or not done is admissible in the following cases, subject to the rules of presumption applicable thereto (Rule 228, *post*, §§ 2068, 2077, 2085).

Par. (a) Lack of news from an absent person, as evidence of his death;

Par. (b). Lapse of time without litigation over a debt, as evidence of its payment;



Par. (c). Failure to find a will, as evidence of its revocation;

Par. (d). Failure by a vendee to take possession, as evidence of fraudulent collusion with the debtor-vendor.

SUB-TOPIC B: ORGANIC TRACES

ART. 10. *Miscellaneous Instances.* The presence or absence
206 of any thing having a physiological or other organic relation to a human act causing it is an admissible trace. — (W. § 168.)

Illustration. On an issue of adultery by a husband, the fact of a venereal disease is admissible as evidence of his intercourse with other women.

ART. 11. *Birth during Marriage, to evidence Paternity.*
207 The birth of a child during marriage is evidence of the husband's paternity. — (W. § 164.)

Par. (a). The effect of this evidence upon the burden of proof is determined by the presumption of legitimacy (Rule 228, *post*, § 2080).

Par. (b). For the purpose of explaining away such evidence, the fact of the mother's intercourse with another man is admissible, under Rule 39 (*ante*, § 191), subject to the presumption of legitimacy (Rule 228, *post*, § 2080).

ART. 12. *Birth to Unmarried Mother, to evidence Paternity.*
208 In any issue involving intercourse with an unmarried woman, whether bastardy, seduction, rape, incest, or the like, the birth of a child, or her pregnancy, is evidence that intercourse was had with her by some one, [but not that it was had by a particular person.]¹ — (W. § 168.)

Par. (a). For the purpose of explaining away such evidence, when offered as a part of the evidence against a particular alleged father, the fact of the woman's intercourse with another man is admissible, under Rule 39 (*ante*, § 191).

¹ This rule is not recognized by all Courts, but the above form recognizes in part each side of the controversy.



ART. 13. *Resemblance of Child, to evidence Paternity.* On
209 an issue involving parentage, the corporal features of the
child, if sufficiently developed, are evidence. — (W. § 166.)

Distinguish (a) the question whether the child can be *shown*
in court (Rule 123, *post*, § 730);

(b) whether a witness' *opinion* of resemblance may be
given (Rule 175, *post*, § 1461).

ART. 14. *Corporal Traits, to evidence Race, etc.* On an
210 issue involving a person's descent from a particular race or
nationality, the corporal features of the person are evidence. —
(W. § 167.)

SUB-TOPIC C: MENTAL TRACES

ART. 15. *Miscellaneous Instances.* The presence or absence
211 of any thing having a mental or psychological relation as
the effect of a human act causing it is a trace admissible under
Rule 41.¹ — (W. §§ 172-176.)

(1) But so far as this mental trace is a *consciousness* or *belief*
existing in the person himself who has done or not done the
act, and is therefore to be itself evidenced by his conduct or
utterances, it is subject to the limitations of Rule 63
(*post*, § 290), governing the admissibility of evidence of a
mental condition, and of Rule 118 (*post*, § 64) governing a
party's implied admissions.

Illustrations. (1) On a charge of murder, the defendant's
consciousness of guilt is evidential as a trace; but his conduct
and utterances are the only mode of evidencing that con-
sciousness, and the rules applicable are those for conduct to
evidence consciousness (Rule 63, *post*, § 290) and for parties'
implied admissions (Rule 118, *post*, § 641).

(2) On an issue of *identity*, the person's recollection or non-
recollection of the important events in the life of the person
in issue is an evidential trace; but his utterances and conduct
are the sole evidence available, and the rules applicable
thereto must govern (Rule 63, Art. 3, *post*, § 293).

¹ In so far as this broad principle would admit the results
of psychological *experiments* based on the association of sen-
sations, it is presumably not yet law.

ART. 16. *Conduct of Animals, to evidence a Human Act.*
 212 The conduct of an animal, such as experience has shown to be a usual effect of human acts, is admissible as a trace. — (W. § 177.)

In particular,

Par. (a). Where the issue involves a particular person's *ownership* or *possession* of the animal, its behavior regarding that person or his property is evidence.

Par. (b). Where the issue involves a particular person's *presence* at a particular place, the behavior of a dog, capable of detecting and accurately following human scent, when laid on the trail, is evidence.

SUB-TITLE II:
EVIDENCE OF A HUMAN QUALITY OR CONDITION

TOPIC I:
EVIDENCE TO PROVE MORAL CHARACTER OR DISPOSITION

RULE 42. *Modes of evidencing Character.* Moral character
215 or disposition is capable of being evidenced circumstantially
in three ways:

(a) By *prior* or *subsequent* moral character of the person
in question. Either of these is admissible, but their use
is affected by the rules for Reputation as evidence of
character, and is therefore dealt with under that topic
(Rule 147, Art. 4, *post*, § 1071).

(b) By moral character of an ancestor as tending to be
transmitted. This is not admissible, the conclusions of
biological science not having yet pointed out any definite
and constant tendencies or tests.

Distinguish the admissibility of *ancestral insanity* (Rule 56,
post, § 263) and *longevity* (Rule 52, *post*, § 248).

(c) By *conduct* of the person in question, exhibiting a
specific trait of moral character. The ensuing rules apply
to this kind of circumstantial evidence. — (W. §§ 190, 191.)

ART. 1. *Rules not applicable to Witnesses.* The following
216 rules apply in evidencing the moral character of *any person*
whose character is material or relevant to be proved under
Rules 30–34 (*ante*, §§ 130–165); but do not apply to the
character of a *witness*.

ART. 2. *Rules of Relevancy and of Auxiliary Policy com-*
217 *bined.* The following rules represent the combined result
of the general principles of Relevancy (Rule 25, *ante*, § 118),
ar^y ry Policy (Rule 26, *ante*, § 123), in particular
s of Undue Prejudice (Rule 166, *post*, § 1390),

Unfair Surprise (Rule 161, Art. 1, *post*, § 1326), and Excessive Confusion of Issues (Rule 165, *post*, § 1383).

SUB-TOPIC A:

CONDUCT TO EVIDENCE CHARACTER OF AN ACCUSED

RULE 43. *Particular Instances of Misconduct not admissible.*

- 218 Even where the bad moral character of a defendant in a criminal case is provable as evidence for the prosecution under Rule 30 (*ante*, § 137), particular instances of misconduct, even though they would be relevant to show the trait of character involved, are inadmissible, for that purpose, by virtue of the principle of preventing Undue Prejudice, (Rule 166, *post*, § 1390), as well as of the principles of preventing Unfair Surprise (Rule 161, Art. 1, *post*, § 1326), and Excessive Confusion of Issues (Rule 165, *post*, § 1383). — (W. §§ 193, 194.)

(*Reason and Policy.* The chief reason for this Rule is the great risk of undue prejudice, *i. e.* that the jury, instead of determining the accused's guilt or innocence of the present charge solely on the evidence of the deed itself, will bring in a verdict of guilty because the accused has at any rate done other bad deeds and therefore will not suffer unjustly by the verdict. In addition to the impropriety of such a reason for a verdict, there is the risk of injustice, due to the circumstance that the other supposed deeds have been in this trial only casually investigated, without fair notice of those issues and opportunity to dispute the correctness of the other charges, *i. e.* the rules against unfair surprise and excessive confusion of issues are involved.

The present Rule is regarded as so important that it dominates the other Rules under this Sub-Title, *i. e.* the tendency to enforce this Rule whenever there is any risk of its violation induces Courts to interpret the other Rules narrowly, so as to exclude evidence which would otherwise be plainly admissible under them; thus to some extent infringing the principle of Multiple Admissibility (Rule 15, *ante*, § 42).)

- ART. 1. *One Criminal Act, not evidential of Another, except*
219 *through an Inference of Motive, Plan, etc.* The doing of another criminal act, not a part of the issue, is therefore not admissible as evidence of the doing of the criminal act charged, except when offered for the specific purpose of evidencing Design, Plan, Motive, Identity, Intent, or other

relevant fact (Rules 50-65, *post*, §§ 240-314) distinct from Moral Character. — (W. § 192.)

ART. 2. *Criminal Quality of Act does not exclude.* If conduct
220 is thus admissible for some other allowable purpose, by virtue of the principle of Multiple Admissibility (Rule 15, *ante*, § 42) its criminal quality and its indication of moral character do not exclude it. — (W. §§ 215, 216.)

Illustrations. (1) In a trial for arson of a barn, the defendant's attempt on two former occasions to burn houses in other parts of the town is not admissible, unless for the purpose of evidencing Intent or Motive.

(2) On a charge of murder by poison, the defendant's murders of other members of the same family by poison, if admissible to show Motive or Intent, are not excluded because they are criminal acts and might cause undue prejudice.

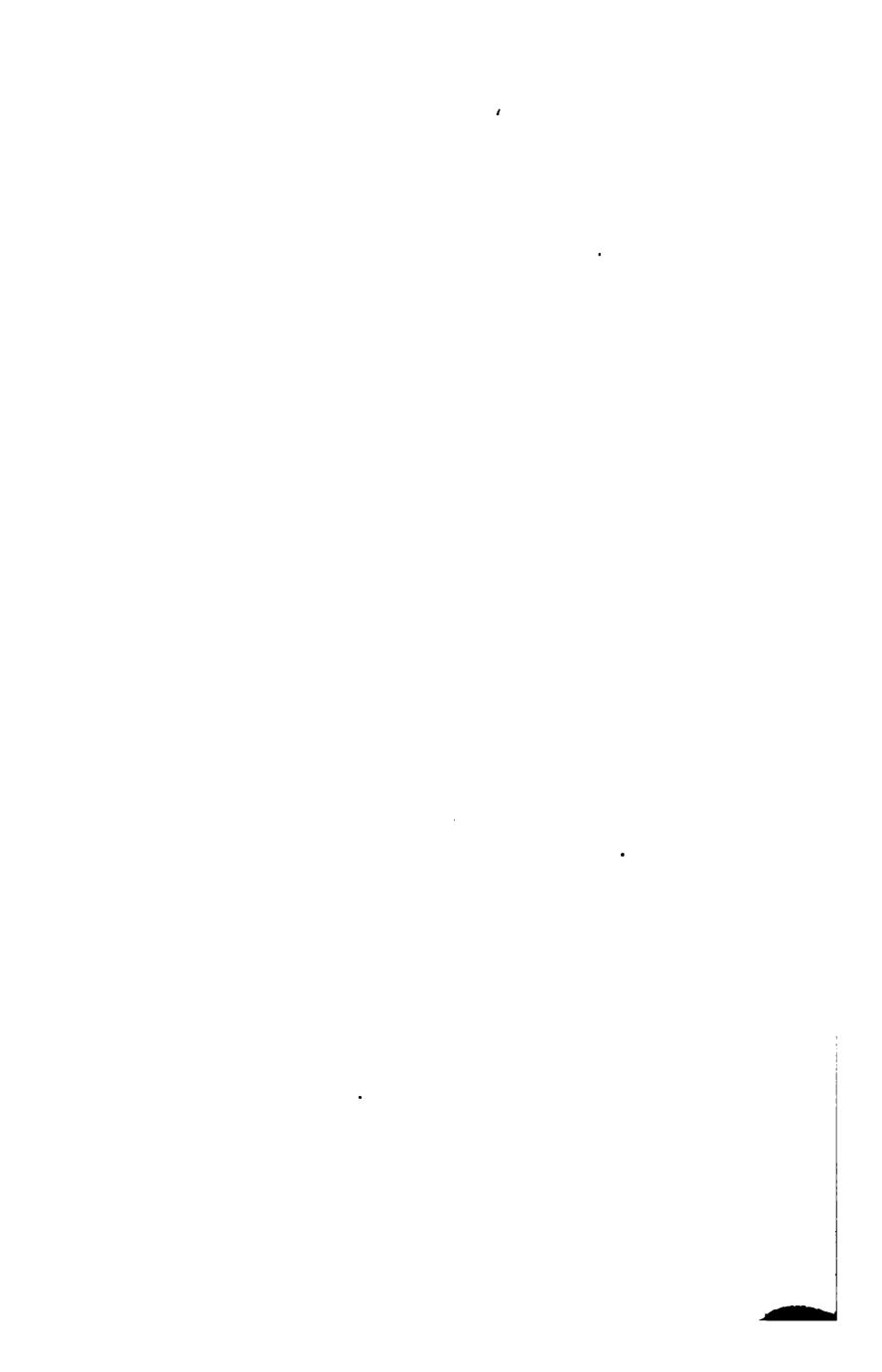
ART. 3. *Other Criminal Acts, as Inseparable in Proof.*
221 Wherever the doing of a criminal act charged appears to have been accompanied by the doing of one or more other criminal acts, so that it is not practicable to separate them in the course of producing evidence, the other acts may be proved, by virtue of the principle of Multiple Admissibility (Rule 15, *ante*, § 42), but not for the purpose of using them evidentially against the defendant's moral character. — (W. § 218.)

Illustrations. (1) On a charge of stealing bank-notes from a letter, the fact that another stolen letter contained other bank-notes, which were taken out and substituted for the ones in question, may be proved as an inseparable part of the act.

(2) On a charge of larceny of a horse, the taking of two other horses as a part of the same act may be proved.

Cross-references. Compare the use of other criminal acts to evidence (1) *Identity* (Rule 68, *post*, § 334); (2) *Stolen possession* (Rule 41, *ante*, § 200).

ART. 4. *Other Conditions of Crime, to increase Sentence.*
222 Wherever a prior conviction of crime may by law be considered for the purpose of affecting the sentence in the case at bar, the prior conviction may be shown, [but not until



§§ 223-226 CONDUCT, TO EVIDENCE CHARACTER

after verdict returned upon the question of guilt].¹—
(W. § 196).

ART. 5. *Other Criminal Acts to Impeach Defendant as*
223 *Witness*. When the defendant takes the stand as a witness, his testimonial character may be evidenced in any manner allowable against a witness under Rules 97, 98, and 105 (*post*, §§ 501, 518, 549) and subject to the limitations of privilege and its waiver (Rule 203, *post*, § 1749).

Distinction. Distinguish the rule for *cross-examining a witness* of the defendant's good reputation as to *rumors of misconduct* negating such reputation (Rule 105, Art. 3, *post*, § 557).

RULE 44. *Particular Instances of Good Conduct not admis-*
224 *sible*. Where the good moral character of a defendant in a criminal case is provable for the defence under Rule 30 (*ante*, § 136), particular instances of good conduct, even though they would be relevant to show the trait of character involved, are inadmissible for that purpose, by virtue of the principle of preventing Unfair Surprise (Rule 161, Art. 1, *post*, § 1326).²—(W. § 195.)

SUB-TOPIC B:

CONDUCT TO EVIDENCE CHARACTER OF OTHER PERSONS EVIDENTIALLY USED

RULE 45. *Particular Acts to evidence Character of Deceased*
225 *in Homicide*. Where, in a trial involving homicide or other violence, and on an issue of self-defence, the deceased's character for violence or turbulence or the opposite is admissible, under Rule 32 (*ante*, §§ 141-145), particular instances of his conduct exhibiting this trait are [not] admissible to evidence such character.³—(W. § 198.)

ART. 1. This rule is applicable in *civil* as well as in criminal
226 cases.

¹ This is the rule of the English and Canadian Statutes and a majority of the statutes in the United States; but a minority improperly omit the concluding proviso.

² This rule, however, is perhaps anomalous.

³ Of the few Courts here on record, a majority accept the negative form.

[[ART. 2. This rule is applicable in favor of the *prosecution* 227 as well as of the defence.¹]]

Distinctions. (1) Distinguish the rule for using the deceased's particular acts of violence to show the *defendant's state of mind* as to apprehension of violence (Rule 62, *post*, § 280).

(2) Distinguish the rule for using the deceased's prior acts of violence to show *ill-feeling between the parties* (Rule 67, Art. 6, *post*, § 329).

RULE 46. *Particular Acts to evidence Character of Party* 228 *or Party's Agent in a Civil Case.* In a civil case, even where the moral character of a party or his agent or a third person is admissible as evidence of the person's probable doing or not doing of an act, under Rule 33 (*ante*, §§ 146-150), particular instances of conduct, even though they would be relevant to show the trait of character involved, are inadmissible for this purpose, by virtue of the principles for preventing Undue Prejudice (Rule 166, *post*, § 1390), Unfair Surprise (Rule 161, Art. 1, *post*, § 1326), and Excessive Confusion of Issues (Rule 165, *post*, § 1383).² — (W. § 199.)

(*Reason and Policy.* The chief reason for this rule is in substance the same as that for Rule 43 in criminal cases, — here applicable to civil cases where the issues involve conduct capable of exciting sentiments of reprehension. Nevertheless, the extent of the risk in civil cases is much less than in criminal cases, and is often none at all).

Distinctions. (1) Distinguish the rule for admitting such conduct to evidence negligent *character in issue* (Rule 49, *post*, § 238), or *physical capacity or skill* (Rule 50, *post*, § 240).

(2) Distinguish the rule for admitting such conduct to evidence an *employer's knowledge* of an employee's *incompetent character in issue* (Rule 62, *post*, § 282).

(3) Distinguish the rule for admitting a *habit* or course of conduct (not involving moral character) to evidence the doing or not doing of an act (Rule 36, *ante*, § 170).

(4) Distinguish the rule for admitting particular instances of the *operation of a machine* (Rule 73, Art. 3, *post*, § 350) or

¹ There is no authority yet for this; but it is fair and rational.

² This rule, generally accepted, seems fair enough. Its only shortcoming is the quibbling distinctions to which it necessarily gives rise.

of the *condition of a highway* (Rule 73, Art. 4, *post*, § 352) to show its defects.

Illustrations. (1) In an action against an employer for injury to a train-fireman by derailment, the negligent act charged being the switchman's wrong setting of signals, prior instances of the switchman's wrong setting of signals would be inadmissible under the present rule, though they might be admissible to evidence the switchman's incompetence as a fellow-servant or the defendant's knowledge thereof.

(2) In an action on a note, with a defence that the note was a forgery of the employer's name by an employee, his practice of signing the employer's name on shop-notices might be admissible as evidence of the employee's technical ability to imitate the signature or of his practice to do so.

(3) In an action for injuries caused by the explosion of dust accumulated near a pulley-shaft in a factory, prior instances of such explosions might be admissible as evidence of the tendency of such an accumulation, though not of the negligent character of the employees in charge.

[ART. 1. The Court may admit such instances, on notice given before trial, under Rule 161, Art. 1 (*post*, § 1326), where in the circumstances the policy of avoiding Undue Prejudice (Rule 166, *post*, § 1390) or Excessive Confusion of Issues (Rule 165, *post*, § 1383) is of no importance.]]¹

229 **RULE 47. Particular Acts to evidence Character of Complainant in Rape, etc.** Wherever the bad moral character for chastity of the woman complainant, on an issue of rape or other unchaste act by a man against a woman in which the latter's consent is material, is admissible under Rule 31 (*ante*, § 138), particular acts exhibiting the woman's unchaste disposition, and thereby her probable consent, are [not] admissible to evidence her character.² — (W. § 200.)

Distinctions. (1) Distinguish the rule for *impeaching the woman's credit* as a witness on cross-examination (Rule 105, Art. 2, *post*, § 552).

(2) Distinguish the rule for using such acts to evidence *non-paternity* on an issue of bastardy (Rule 39, *ante*, § 191).

(3) Distinguish the rule for using other acts of *intercourse with the defendant himself* as evidence of the woman's motive to consent (Rule 67, Art. 6, *post*, § 329).

¹ This is not law, but gives a desirable flexibility to the rule.

² The jurisdictions are divided *pro* and *contra* this rule.

[ART. 1. The woman's habitual *prostitution* is to be regarded, for the purpose of the present rule, as involving general character, and not particular acts.]¹ — (W. § 200.)

RULE 48. *Conduct to evidence Disposition of an Animal.*

230 Wherever the disposition of an animal is admissible evidentially under Rule 33, Art. 6 (*ante*, § 152), or is provable as a part of the issue, particular instances, relevant to show the trait involved, are admissible. — (W. § 201.)

Distinctions. (1) Distinguish the admissibility of an animal's conduct to show the owner's notice of its propensity (Rule 62, *post*, § 283).

(2) Distinguish the admissibility of an animal's conduct to show *ownership* by its recognition, etc. (Rule 41, Art. 15, *ante*, § 212).

SUB-TOPIC C: CONDUCT TO EVIDENCE CHARACTER IN ISSUE

231 RULE 49. *General Principle.* Wherever a person's moral character is a part of the issues in the case under the pleadings, the principles for preventing Undue Prejudice (Rule 166, *post*, § 1390), or Unfair Surprise (Rule 161, Art. 1, *post*, § 1326), or Excessive Confusion of Issues (Rule 165, *post*, § 1383) are [not] consistent with using particular instances of conduct.

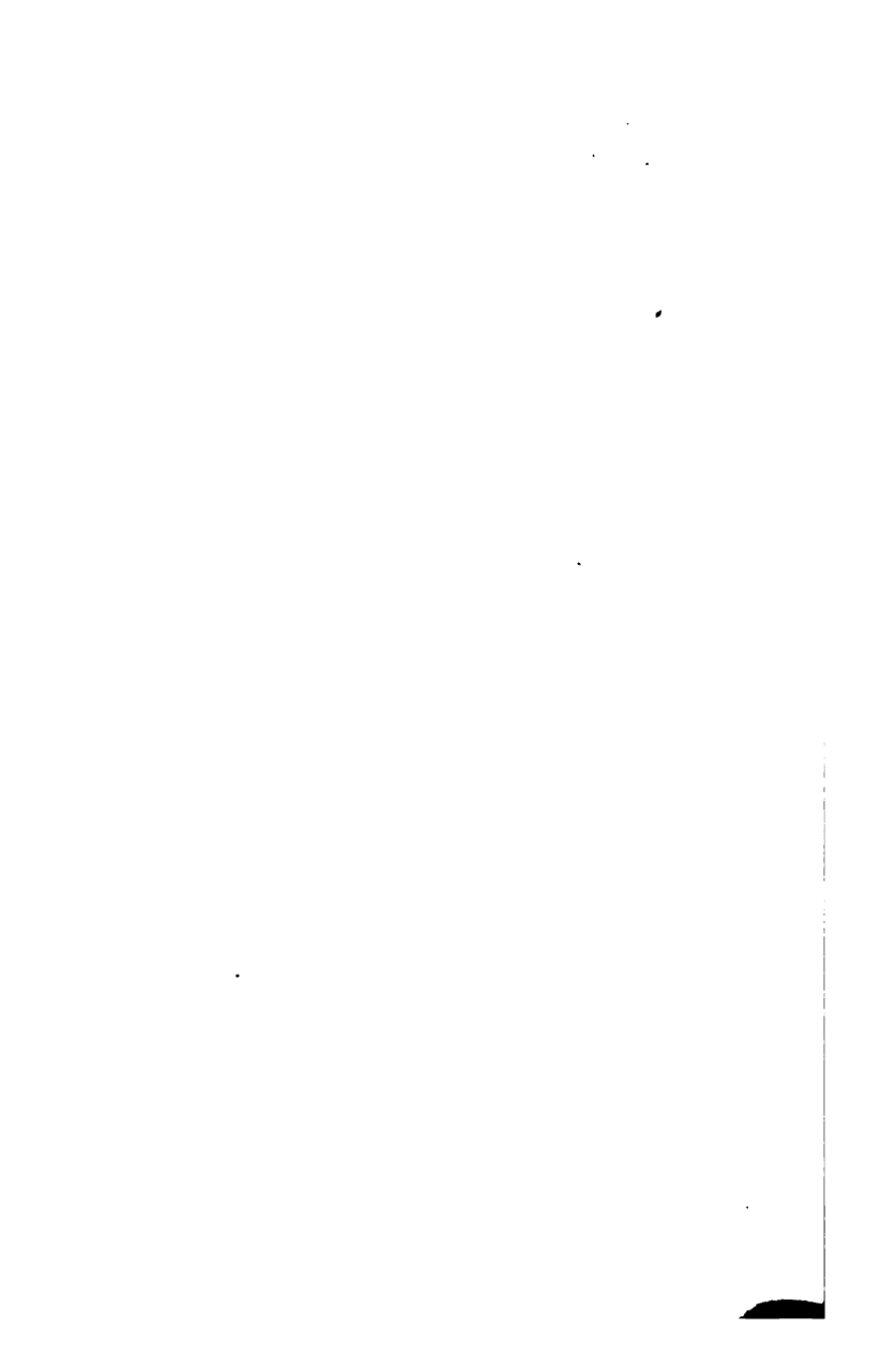
Such instances exhibiting the trait in question are therefore [not] admissible, [[subject to the trial Court's determination in limiting their number, under Rule 165 (*post*, § 1385), and in ordering a notice of particulars to be filed before trial under Rule 161, Art. 1 (*post*, § 1326)]];

with the following further details and qualifications.² — (W. § 202.)

232 ART. 1. *Common Offenders.* Particular acts are admissible under the present rule on a charge of being a common cheat,

¹ This article is needed only in a jurisdiction taking the negative of the main Rule.

² The affirmative form of the rule is the orthodox one, though denied in some Courts. The clause in double brackets is not a part of the orthodox rule; but it serves to obviate the only objections to that rule, viz. to avoid Unfair Surprise and Excessive Confusion of Issues.



§§ 233-237 CONDUCT, TO EVIDENCE CHARACTER IN ISSUE

common liquor-seller, common gambler, common drunkard, or the like.¹ — (W. § 203.)

Cross-reference. Such acts would also be admissible under Rule 66 (*post*, 316), for evidencing a habit.

ART. 2. *House of Ill-fame.* On an issue involving the keeping
233 of premises for prostitution, particular instances are admissible

(a) of prostitution on the premises, to evidence their use;

(b) of prostitution by the inmates, to evidence their occupation.² — (W. § 204.)

ART. 3. *Seduction.* Wherever by law the seduction of a
234 woman is a crime against the State or a civil cause of action by her, and her prior actual (not reputed) chaste character is expressly or impliedly essential to the crime or cause of action, particular prior acts of unchastity by her, including lewd conduct not involving intercourse, are admissible for the defence.³ — (W. § 205.)

ART. 4. *Excuse for Breach of Marriage-Promise.* Where
235 the unchaste character of the promisee is by law an excuse for breach of promise of marriage, the unchaste character may be evidenced by particular acts of intercourse with another person or of other lewd behavior. — (W. § 206.)

ART. 5. *Justification of Defamation of Character.* In an
236 action for defamation by an utterance involving a bad general character or trait thereof or habit of conduct, and the truth of the utterance is pleaded in defence, particular instances exhibiting the trait or habit are [not] admissible for the defence.⁴ — (W. § 207.)

ART. 6. *Incompetence of Physician.* In an issue involving
237 the competence of a physician or other person requiring

¹ All Courts concede this.

² Practically all Courts concede this.

³ The words of the State statute are here determining.

⁴ Some Courts admit; some exclude; some require the particular acts to be pleaded or furnished in a bill of particulars. The last is the sensible rule, and is here provided for by the clause in brackets in § 231, *ante*.

[illegible]

the 1990s, the number of people in the world who are under 15 years of age is expected to increase from 1.1 billion to 1.5 billion. The number of people aged 65 and over is expected to increase from 250 million to 450 million. The number of people aged 15 and over is expected to increase from 3.5 billion to 4.5 billion. The number of people aged 15 and over is expected to increase from 3.5 billion to 4.5 billion. The number of people aged 15 and over is expected to increase from 3.5 billion to 4.5 billion.

§§ 238-239 CONDUCT, TO EVIDENCE CHARACTER IN ISSUE

professional skill, particular instances exhibiting such skill or the opposite are [not] admissible.¹ — (W. §§ 67, 87, 221.)

Cross-reference. Compare the rule for admitting the *general character* of such a person for skill (Rule 33, *ante*, § 150), and for evidencing *skill* by particular instances (Rule 50, *post*, § 242).

ART. 7. *Incompetence of Employee.* In an issue involving
238 the competence of an employee, particular instances of conduct exhibiting such competence or the opposite are admissible. — (W. § 208.)

Distinctions. (1) Distinguish the use of such conduct as evidence of negligent character *not in issue* but relevant to the issue (Rule 46, *ante*, § 228), or as evidence of the *employer's knowledge* of the employee's competence (Rule 62, *post*, § 282).

(2) Distinguish the use of *acts of intoxication*, as evidence of intemperate habits (Rule 66, *post*, § 316).

Illustrations. See § 228, *ante*.

ART. 8. *Mitigation of Damages.* In any action where the
239 moral character of the plaintiff or a third person may by the law of damages and by Rule 34 (*ante*, § 154), be considered by the tribunal in fixing the amount of damages to be recovered, and such moral character involves the actual character and not merely the reputation thereof (as distinguished in Rule 29, *ante*, § 126), particular instances of conduct exhibiting the trait of character in question are admissible for the defence; that is to say,

Par. (a). In an action for *defamation*, the plaintiff's conduct is not admissible. — (W. § 209.)

Distinguish the use of such conduct to evidence character on a *plea of truth* (Rule 49, Art. 5, *ante*, § 236).

Par. (b). In an action for *malicious prosecution*, the plaintiff's conduct is not admissible. — (W. § 209.)

Distinguish the use of such conduct to evidence the defendant's *probable cause* for prosecution (Rule 62, *post*, § 288).

Par. (c). In an action by a parent for *seduction* of a daughter,

¹ Few Courts have ruled.

(1) such conduct of the *parent* is admissible. — (W. § 210);
and

(2) such conduct of the *daughter* is admissible. —
(W. § 211.)

Distinguish the use of such conduct to evidence the woman's character in the *statutory wrong or crime* of seduction (Rule 49, Art. 3, *ante*, § 234).

Par. (d). In an action for *criminal conversation* or for *alienation of affections*, such conduct of either the plaintiff or the other spouse is admissible. — (W. § 211.)

Par. (e). In an action for *indecent assault* or for *breach of promise of marriage*, such conduct of the plaintiff is admissible. — (W. §§ 212, 213.)

TOPIC II:

EVIDENCE TO PROVE CORPORAL CONDITION OR CAPACITY

240 RULE 50. *Particular Instances of Conduct.* Wherever the corporal condition or capacity of a person is in issue, or under Rule 35 (*ante*, § 367) is evidentially relevant to a fact in issue, particular instances of the person's conduct or bodily action are admissible for that purpose, even though they might be inadmissible under Rule 43 (*ante*, § 218) to evidence moral character. — (W. § 219.)

241 ART. 1. *Strength, Illness, etc.* Corporal strength, illness, ability, or the like, may be thus evidenced. — (W. § 220.)

242 ART. 2. *Skill or Mechanical Means.* Manual skill or ability or the like may be thus evidenced, by instances, or by the possession of tools or apparatus giving such ability. — (W. § 221.)

Cross-references. (1) A *physician's skill* may be thus evidenced by instances; but the rule for evidencing Character is generally held to apply (Rule 49, *ante*, § 237).

(2) *Possession of tools* may be also evidence of *design* (Rule 59, *post*, § 267).

(3) *Voice-quality* may be thus evidenced by utterances; but other rules here become applicable according to circumstances, viz. sufficiency for *identification* (Rule 86, Art. 4,

§§ 243-247 EVIDENCE OF CORPORAL QUALITIES

post, § 404), the *opinion* rule, for the witness identifying (Rule 175, *post*, § 1464), the *oath* rule, for voice-utterances used as testimony (Rule 157, *post*, § 1285).

(4) *Capacity of vision* may be thus evidenced by instances, but usually the purpose of this is to evidence the nature of the *object seen* (Rule 73, Art. 5, *post*, § 354), not the capacity of the particular person seeing.

ART. 3. *Pecuniary Capacity*. A person's pecuniary
243 capacity to pay or to lend money, being in issue or being relevant under Rule 35 (*ante*, § 169), may be evidenced by his conduct in borrowing money or in not paying money due. — (W. § 224.)

Distinguish the *possession* or *lack* of money as evidencing a *motive* for committing a crime, seeking a loan, or the like (Rule 67, Art. 3, *post*, § 326).

RULE 51. *Physical Appearance*. Wherever a person's
244 corporal qualities are in issue or relevant, the external corporal appearance of the person is admissible, in so far as such appearances are in ordinary life acted upon as evidence. — (W. §§ 221-223.)

ART. 1. *Age*. A person's *age* may be thus evidenced. —
245 (W. § 222).

Distinguish (1) appearance as evidence of *belief* by a person observing (Rule 62, *post*, § 285);

(2) the *jury's inspection* of appearance (Rule 123, *post*, § 730).

ART. 2. *Health, Strength, etc.* A person's *health* or *strength*
246 may be thus evidenced. — (W. §§ 221, 223.)

Distinguish (1) the effect of the *Opinion* rule (Rule 175, *post*, § 1461) on the method of evidencing appearance in any of these cases.

(2) the *qualification* of a *lay witness* to testify to appearances of disease (Rule 83, Art. 4, *post*, § 382).

RULE 52. *Predisposing Circumstances*. The existence of
247 a corporal quality or condition may be evidenced by circumstances likely to produce it.

ART. 1. *Heredity.* The presence of the quality or condition in members of the person's family from whom it might be inherited is thus admissible, provided there is other evidence of its existence in the person in question. — (W. § 223.)

Cross-reference. For hereditary insanity, see Rule 56, *post*, § 263.

ART. 2. *Occupation.* The special nature of a person's occupation or mode of livelihood is thus admissible. — (W. § 223.)

RULE 53. *Prior or Subsequent Condition.* A person's condition or quality of any sort may be evidenced by its prior or subsequent existence or absence, at a time not so remote as to take away all fair probability of its continuance under the circumstances of the case. — (W. § 225.)

Cross-references. For other instances of the application of this rule, arising in the use of *photographs*, see Rule 93, Art. 2, *post*, § 480.

TOPIC III:

EVIDENCE TO PROVE MENTAL CAPACITY

RULE 54. *General Principle.* Wherever a person's mental capacity is in issue or relevant, it may be evidenced either by the person's conduct, utterances, or appearances exhibiting it, or by pre-existing external circumstances tending to produce it, or by its prior or subsequent existence in him; subject to the following limitations. — (W. § 227.)

RULE 55. *Conduct, Utterances, and Appearances.* Any act, utterance, or appearance of a person is admissible, for consideration as evidence to the jury; subject to the usual general rules, namely: — (W. § 228.)

Par. (a) that the judge may exclude facts which tend to confuse the issues without adding valuable evidence (Rule 165, *post*, § 1383);

Par. (b) that the judge may declare a given quantity of evidence insufficient to go to the jury (Rule 227, *post*, § 2002);

Par. (c) that no presumption of insanity or sanity be made from any specific fact except as authorized by the rules of presumption (Rule 228, *post*, §§ 2041, 2045).

ART. 1. *Suicide*. The fact of *suicide* is thus admissible. 253

ART. 2. *Testamentary Plans*. Other *testamentary* acts, 254 plans, and conversations are thus admissible. — (W. § 229.)

ART. 3. *Disinheritance*. The *disinheritance* of near relatives 255 is thus admissible. — (W. § 229.)

ART. 4. *Delusion*. A *delusion* of fact is thus admissible. — 256 (W. § 228.)

Distinguish the use of *communicated facts*, whether true or false, as predisposing to insanity (Rule 56, *post*, § 261).

ART. 5. *Third Persons' Communications*. The person's 257 *treatment* of third persons' communications is thus admissible. — (W. § 228.)

Illustration. On receipt of a letter demanding rent, the person replies, disputing the reckoning, or claiming that an angel has promised to pay it; this reply, with the letter, is admissible.

Cross-reference. The hearsay rule (Rule 155, *post*, § 1258) does not prevent.

ART. 6. *Explanations*. On the general principle of Ex- 258 planation (Rule 24, Art. 5, *ante*, § 117), any fact explaining away the apparent significance of such conduct, utterance, or appearance, is admissible. — (W. § 228.)

ART. 7. *Undue Influence*. A testator's incapacity to resist 259 the control of a third person alleged to have used undue influence in procuring the execution of the will may be evidenced by any of the present modes. — (W. § 230.)

ART. 8. *Hearsay Rule*. Utterances of the person asserting 260 any fact are not to be used as testimonial evidence of that fact under the present Rule, except so far as this use is permitted by the exceptions to the hearsay rule (Rule 153, Art. 4, *post*, § 1218).

RULE 56. *Predisposing Circumstances*. Any circumstance 261 tending to produce the form of mental incapacity in question

is admissible, provided other evidence of such incapacity is in the case. — (W. § 231.)

ART. 1. *Miscellaneous Occurrences.* Circumstances likely
262 to cause mental shock or disturbance are thus admissible, if they have been communicated to the person; but their supposed effect may be explained away as in Rule 55, Art. 6 (*ante*, § 258). — (W. § 231.)

Illustration. In a trial for homicide, defence insanity, caused by the deceased's reported rape of the defendant's daughter, the report of the rape to him is admissible for the defence; the fact that the defendant had consented to the deceased's unlawful attempts is admissible for the prosecution.

Distinguish the question whether the witness to such reports can be discredited by disproving the facts reported (Rule 107, *post*, § 567); and the question of the hearsay rule (Rule 155, *post*, § 1258).

ART. 2. *Heredity.* The presence of insanity in members of
263 the person's family from whom it might be inherited is admissible, provided there is other evidence under Rule 55 (*ante*, § 252) or Rule 57 (*post*, § 264) of its existence in the person in question. — (W. § 232.)

RULE 57. *Prior and Subsequent Condition.* A person's
264 prior or subsequent condition as to sanity or insanity is admissible to evidence his condition at the time in issue; the range of time depending on the circumstances of the particular case as to the kind of the alleged incapacity, its probable persistence, and the person's habits and health. — (W. § 233.)

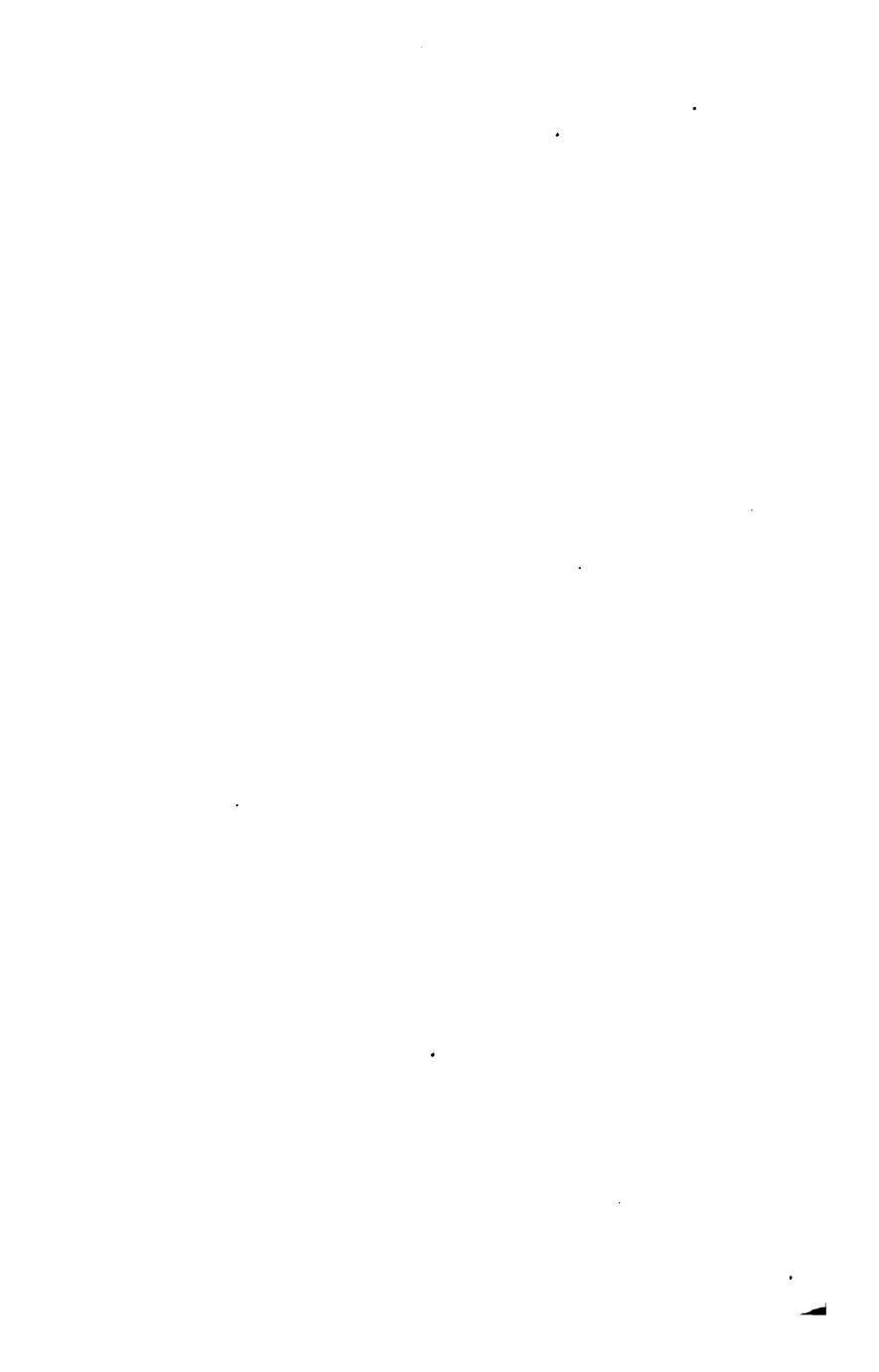
Distinctions. Distinguish the application of other rules where the present rule is incidentally involved, particularly (1) the rule for using an *inquisition* of lunacy (Rule 148B, Art. 4, *post*, § 1140).

(2) the rule for using utterances admissible under the Hearsay exception (Rule 153, Art. 4, *post*, § 1218).

RULE 58. *Intoxication.* Intoxication, as a condition of
265 temporary mental derangement, may be evidenced

Par. (a) by the person's conduct;

Par. (b) by his prior drinking of intoxicative liquor;



Par. (c) by his *prior* or *subsequent* condition of intoxication. — (W. § 235.)

Distinguish (1) the admissibility of a *habit* of drinking as evidence of being drunk at a particular time (Rule 36, *ante* § 171);

(2) the admissibility of an intoxicated condition as evidence of incapacity to do a *specific act* (Rule 35, *ante*, § 168).

TOPIC IV:

EVIDENCE TO PROVE DESIGN OR PLAN

RULE 59. *General Principle.* Whenever a person's design
266 or plan to do an act is in issue, or is relevant under Rule 37 (*ante*, § 137), it may be evidenced circumstantially

(a) by his conduct or utterances indicating the design or plan,

(b) or, by the prior or subsequent existence of the design or plan. — (W. § 237.)

Distinctions. (1) Distinguish the testimonial use of his *assertions* to evidence the design or plan under the hearsay exception (Rule 153, Art. 2, *post*, § 1207);

(2) the use of his conduct to evidence *motive* or *emotion* (Rule 67, *post*, § 322);

(3) the use of his conduct to evidence *intent accompanying an act* (Rules 60, 65, *post*, §§ 271, 297);

(4) the use of his conduct to evidence *knowledge* or *belief* (Rules 63, 65, *post*, §§ 271, 290).

ART. 1. *Miscellaneous Instances.* Any act or utterance
267 which, under the circumstances and according to practical experience, naturally interpreted, would indicate a probable design or plan to do an act or class of acts, is admissible;

in particular, acts or utterances involving

Par. (a) preparation of *materials*,

Par. (b) possession of *tools*, *documents*, or *weapons*,

Par. (c) journeys or experiments,

Par. (d) inquiries, prophecies, or allusions. — (W. § 238.)

ART. 2. *Explanatory Circumstances.* On the general
268 principle of Rule 24, Art. 5 (*ante*, § 117), circumstances which tend to explain away the significance of such acts or utterances are admissible. — (W. § 239.)

ART. 3. *Similar Offences.* The doing of one or more acts, 269 similar to the act in issue, whether or not having a criminal nature, may be admitted for the present purpose, subject to the limitations prescribed in Rule 65 (*post*, § 297.)

ART. 4. *Prior or Subsequent Design.* A person's prior or 270 subsequent design is admissible to evidence his design or plan at a particular time in issue; the range of time depending on the circumstances of each case. — (W. § 241.)

TOPIC V: EVIDENCE TO PROVE INTENT

RULE 60. *General Principle.* Intent is a person's state of 271 mind, at the time of doing an act, with reference to his volition of the act and its external consequences. The intent may thus be evidenced circumstantially

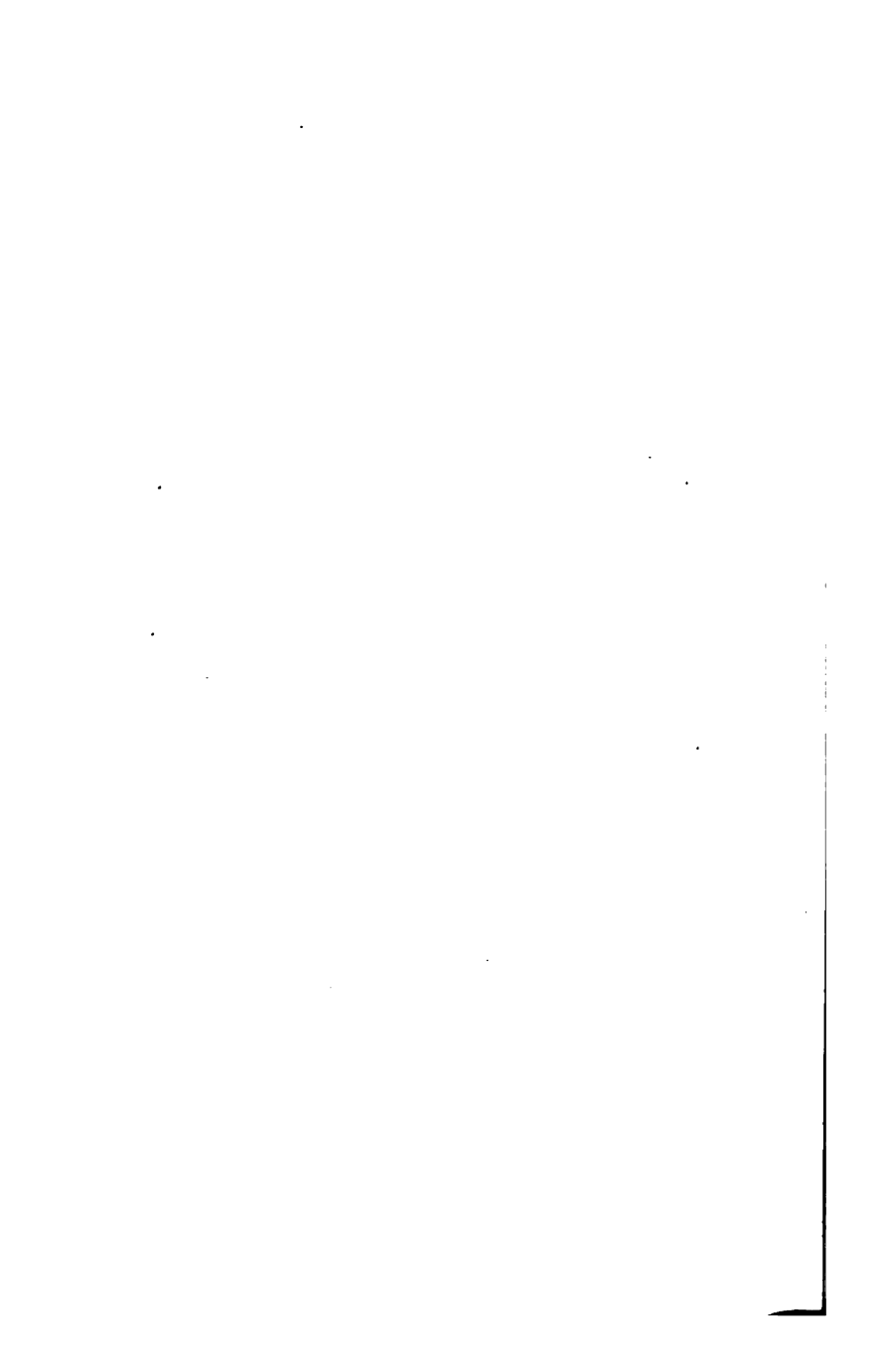
(a) by his conduct or utterances,

(b) or, by his prior or subsequent state of mind. — (W. § 242.)

ART. 1. *Motive, Knowledge, Design, distinguished.* Intent 272 signifies a state of mind distinct from Motive, Knowledge, or Design; although for the purposes of criminal or other law two or more of these states of mind may be material and may for practical purposes be known together as Intent.

Illustration. A pulls the trigger of a pistol and the discharge wounds M. Here, A's Intent is his state of mind as to volition to pull the trigger and wound M; but (1) his Knowledge whether the pistol was loaded is a separable element, which may be separately evidenced; (2) his Motive for doing it, *e. g.* self-defence or revenge, is a separable element which may be separately evidenced; (3) his Design beforehand to do it is a separable element, which may be separately evidenced. Moreover, even though he had such knowledge and motive and design it may still be the fact that the actual pulling of the trigger and discharge of the pistol at the time of the act was accidental or inadvertent and therefore without volition, *i. e.* Intent on his part to do so.

ART. 2. *Sundry Evidence.* The Intent at the time of the 273 act may thus be evidenced by any one of these other states of mind, prior or subsequent, or by the conduct and utterances



of the person at the time of the act; and any evidence receivable for such other purposes may be also applied to evidence the Intent.

ART. 3. *Similar offences.* The doing of one or more acts
274 similar to the act in issue, whether or not having a criminal nature, may be admitted for the present purpose, subject to the limitations prescribed in Rule 65 (*post*, §§ 297-314).

ART. 4. *Hearsay Rule.* Where the person's utterances
275 asserting an intent are offered in evidence, they must satisfy the hearsay rule or one of its exceptions, as set forth in Rules 153, 155 (*post*, §§ 1200, 1240) or the rule for a party's admissions (Rule 115, *post*, § 630).

Illustrations. This applies not only in criminal cases, but also in issues of agency, wills, and the like.

TOPIC VI:

EVIDENCE TO PROVE KNOWLEDGE, BELIEF, OR CONSCIOUSNESS

RULE 61. *General Principle.* A person's knowledge, belief,
276 or consciousness of a matter may be evidenced circumstantially

(a) by external circumstances likely to produce such a state of mind;

(b) by his conduct or utterances indicating it;

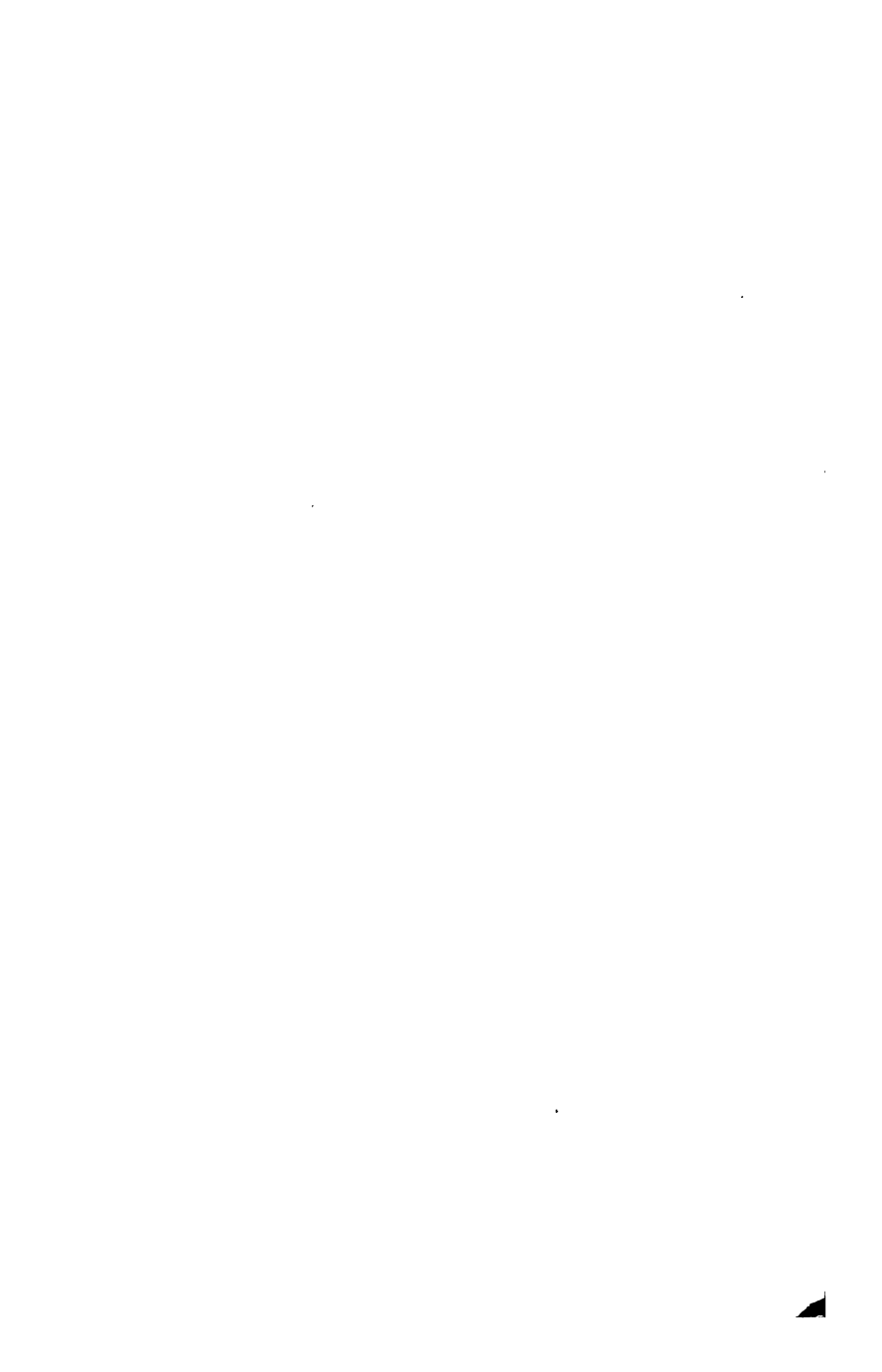
(c) or, by the prior or subsequent existence of such a state of mind.

Distinguish the use of the person's utterances *asserting* the existence of such a state of mind; this testimonial use of such assertions must satisfy the Hearsay rule or one of its exceptions (Rules 153, 155, *post*, §§ 1200, 1240).

SUB-TOPIC A:

EXTERNAL CIRCUMSTANCES AS EVIDENCE OF KNOWLEDGE, BELIEF, OR CONSCIOUSNESS

RULE 62. *General Principle.* Any external circumstance,
277 the occurrence of which is likely to have produced in a person a knowledge, belief, or consciousness of a relevant matter, is admissible, subject to any specific qualifications in the ensuing rules.



Such circumstances may be classified, in their nature of operation, as follows:

- (a) *Direct exposure* of the matter to the person's sense of sight, hearing, or the like;
- (b) *Express communication* of the matter, by the utterance of another person;
- (c) *Reputation* of the matter in the community;
- (d) *Intrinsic nature* of the matter, as likely to operate in one or more of the foregoing modes. — (W. §§ 245, 261.)

The following specific rules are not classified in the foregoing modes of operation, but according to the kind of facts of which the knowledge, belief, or consciousness is to be shown.

Cross-reference. In Arts. 1-11, below, the hearsay rule is no obstacle (Rule 155, *post*, § 1258).

ART. 1. *Defendant in Homicide; Deceased's Reputed*
 278 *Character.* When in a case of homicide or other violence self-defence is in issue, and some other evidence of the injured person's aggression has been introduced, the character of the injured person for violence, or for other aggressive trait likely to cause apprehension and a belief in the necessity for self-defence, is admissible for the party alleging self-defence; — (W. § 246.)

Provided,

Par. (a) that the character must be *known* to the latter party, or so *reputed* as probably to have come to his knowledge;

Par. (b) that the character of a *third person* associated in the affray may on the same terms be admissible;

Par. (c) that the person's reputed character for *peaceableness* or the like is admissible for the party denying self-defence [in rebuttal] ¹.

Distinguish the admissibility of the injured person's violent character as evidence of his *probable aggression* (Rule 32, *ante*, § 141), and not, as here, of the state of mind of the party alleging self-defence.

¹ The qualifying words in brackets are the law in most jurisdictions, but ought not to be.



ART. 2. *Defendant in Homicide; Deceased's Threats.* A threat of violence, made by the injured person against a party alleging self-defence, is admissible on the same terms as in Art. 1 above; [except that other evidence of aggression need not be first introduced].— (W. § 247.)

Distinguish the use of *uncommunicated threats* as evidence of the injured person's *probable aggression* (Rule 37, *ante*, § 182), and not, as here, of the state of mind of the party alleging self-defence.

ART. 3. *Defendant in Homicide; Deceased's Violent Acts.* An act of violence, done by the other person prior to the affray in issue, is [not] admissible for a party alleging self-defence, on the same terms as in Art. 1 above, provided, it was of a nature to indicate an aggressive disposition.²— (W. § 248.)

Distinguish (1) the use of violent acts as evidence of the person's *actual character* under Rule 45 (*ante*, § 226).

(2) the use of acts of *hostility to the present defendant*, indicating a *motive* of aggression under Rule 67, Art. 6 (*post*, § 329).

ART. 4. *Employer of an Incompetent Employee; Reputed Character of the Employee.* Wherever by the substantive law an employer's knowledge of the incompetent character of an employee is material, the reputation of the employee as to the trait of character in question, in his place of domicile [or employment] is admissible to evidence the employer's knowledge.³— (W. § 249.)

Distinctions. (1) The reputation may also be admissible to evidence the employee's *actual character*, under the hearsay exception (Rule 147, Art. 4, *post*, § 1071).

(2) The reputation, in a few States, may constitute *per se* negligence of the employer, irrespective of its evidencing his probable knowledge.

(3) The employee's *actual character* may not be admissible so far as it is offered to evidence the doing of the act (Rule 33, Art. 2, *ante*, § 148).

¹ The qualifying phrase in brackets is not the law in some jurisdictions, but perhaps ought to be.

² The negative rule obtains in some jurisdictions; most Courts have not passed upon it.

³ The words in brackets are in many jurisdictions not law, but ought to be.

ART. 5. *Employer of an Incompetent Employee; Acts of*
 282 *the Employee.* On the issue named in Art. 4 above, a specific act or acts of the employee, indicating incompetence in the trait in question, is [not] admissible to evidence the employer's knowledge, if done under circumstances likely to bring it to his notice; [[provided the principles of Excessive Confusion of Issues (Rule 165, *post*, § 1383), or of Unfair Surprise (Rule 161, Art. 1, *post*, § 1326) do not, in the case in hand, make it improper.]]¹ — (W. § 250.)

Distinguish the use of such acts of the employee

(1) to evidence his *actual incompetence* (Rule 49, *ante*, § 238),

(2) to evidence his *negligent character* offered evidentially to show a probable negligent act at the time in question (Rule 46, *ante*, § 228).

Illustration. See § 228 (1), *ante*.

ART. 6. *Owner of a Vicious Animal.* To evidence the
 283 owner's or possessor's knowledge of the vicious quality of an animal,

Par. (a) the *reputation* of the animal is admissible;

Par. (b) *particular acts* of the animal are admissible. — (W. § 251.)

ART. 7. *Owner of Defective Premises or Chattel.* To evi-
 284 dence the owner's or possessor's knowledge of the defective quality of premises or a chattel,

Par. (a). The *repute* in the community is admissible;

Par. (b). A similar *personal injury*, or other harmful result, occurring at a prior time at the same premises or chattel, is admissible;

Par. (c). The known condition of a *related part* of the same premises or chattel is admissible. — (W. § 252.)

Distinguish the use of prior similar injuries to evidence the *actual* defective quality of the premises or chattel (Rule 73, Art. 4, *post*, § 354).

¹ A few jurisdictions take the negative. The double-bracketed proviso, which allows a suitable flexibility to the rule, is not expressly recognized in present practice.

ART. 8. *Person dealing with an Insolvent, Intemperate, or Lunatic.* To evidence a person's knowledge or belief as to the insolvency, insanity, intemperance, or the reverse, of another person making a sale or purchase, the latter's reputation is admissible. — (W. §§ 253, 256, 257.)

Distinguish the use of the reputation, by exception to the hearsay rule, to evidence *actual* insolvency, intemperance, insanity, or the reverse (Rule 47, Art. 5, *post*, §§ 1084).

ART. 9. *Sundry Persons dealing with Property.* The reputation of premises or a chattel is admissible to evidence knowledge or belief, on the part of a person possessing or owning it, as to its being *adversely possessed, stolen, kept for gambling or prostitution, or the like.* — (W. § 254.)

Distinguish the use of reputation to show the *actual* mode of user in question (Rule 47, Art. 5, *post*, § 1084).

ART. 10. *Person dealing with a Partnership.* To evidence a person's knowledge of the dissolution of a partnership, the *publication* of notice in a suitable newspaper, or the *reputation* of dissolution, is admissible. — (W. § 255.)

Distinguish the question whether a particular mode of notice *suffices per se* in substantive law.

ART. 11. *Person Prosecuting or Arresting without Probable Cause.* In an issue involving the justifiableness of a prosecution or arrest, the prosecuting or arresting party's belief or probable cause may be evidenced by the other person's *reputed character*, or by his *reputed prior particular acts* of misconduct, or by *express communications* received from third persons. — (W. § 258.)

ART. 12. *Possessor of a Document.* The possession of a document is evidence of the possessor's knowledge of its contents. — (W. § 260.)

Distinguish (1) the possession of the document as an *admission* of the *correctness* of its contents (Rule 119, Art. 4, *post*, § 671), particularly where the books of a partnership or corporation are concerned;

(2) the presence of a document *on a person's premises* as evidence that he was at a prior time in possession of it (Rule 41, *ante*, § 203);

(3) the utterance or possession of other *counterfeit* documents as evidence of knowledge or intent (Rule 65, Art. 4, *post*, § 301).

(4) the substantive effect of *keeping* a document as a *waiver* of the right to dissent or rescind.

SUB-TOPIC B:

CONDUCT OR UTTERANCES, AS EVIDENCE OF KNOWLEDGE, BELIEF, OR CONSCIOUSNESS

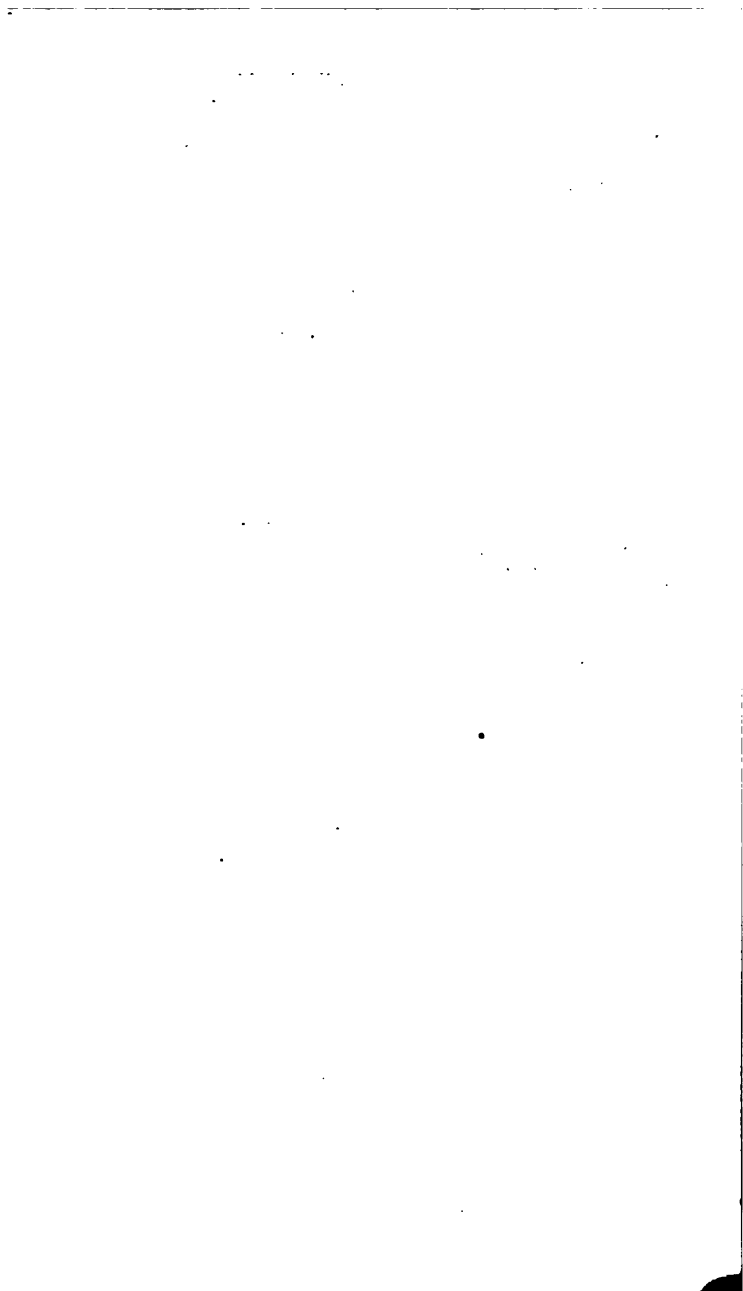
290 RULE 63. *General Principle.* Wherever a person's knowledge, belief, or consciousness of a matter is in issue or relevant, his conduct or utterance indicating circumstantially the existence of such knowledge, etc., is admissible. — (W. §§ 265, 266.)

291 ART. 1. *Belief per se Material.* If the person's belief or knowledge is in itself a part of the issue or is relevant otherwise than by Rule 41 (*ante*, § 211), it is no ground for exclusion of the conduct or utterances that the fact said to be believed or known is also material, and that therefore the conduct or utterance might also be credited by the jury as an implied assertion of that fact; the judge's instruction against such misuse of them being a sufficient precaution, under the principle of Multiple Admissibility (Rule 15, *ante*, § 42).

Illustrations. (1) Murder of a pregnant paramour; the defendant maintained that death was by suicide. The deceased's utterances indicating a knowledge of pregnancy are receivable, because this knowledge was material to her motive; though her statement is not receivable as testimony to the fact of pregnancy.

(2) Death of an insured; issue as to the fact of his disease and the falsity of his representations of good health at the time of insuring; the deceased's utterances indicating a knowledge of his disease are receivable for that purpose, even though not admissible to prove the fact of disease, either as a party's admissions or as a hearsay exception.

292 ART. 2. *Belief otherwise Relevant.* If the person's knowledge or belief is relevant only as evidential of the truth of the fact believed, on the principle of Rule 41 (*ante*, § 211), and thus there is likelihood that his conduct or utterance



would receive credit with the jury solely as an implied assertion of that fact, then it is not admissible — (W. § 267.) Unless,

Par. (a) some specific *exception to the hearsay rule* is applicable; or

Par. (b) the person is one whose statements would be receivable as the *admissions of a party or privy*; or

Par. (c) the case falls within one of the classes mentioned in Art. 3, below.

Illustrations. (1) A will is offered to be proved by oral testimony of those who saw it, the loss of the original being alleged; the heirs dispute the existence of any will; the testator's belief, as to having made a will or not, would be theoretically evidential under Rule 41 (*ante*, § 211), yet his utterances or conduct evidencing such a belief would be excluded by the present rule; unless *Par. (c)* applies.

(2) On a charge of murder, the defence alleges that the guilty party is M, and offers the flight of M as part of the evidence; this would be inadmissible except under *Par. (c)*.

(3) On a charge of making counterfeit money, the defendant's conduct and utterances showing a knowledge of the place where the counterfeit money was kept are receivable; because he is a person whose statements would be receivable as a party's admissions.

(4) On an issue of seaworthiness of a vessel, the captain's conduct in embarking in it is not admissible to evidence his belief and thus thereby to evidence the fact of seaworthiness.

ART. 3. *Exceptions.* The conduct and utterances of a
293 person *not a party or privy* are receivable, under *Par. (c)* of Art. 2 above, in the following cases: .

Par. (a) conduct and utterances evidencing the *consciousness of guilt* of a third person, subject to the limitations of Rule 40, Art. 3 (*ante*, § 194), and of Rule 118, Arts. 3, 4 (*post*, § 650).

Par. (b) conduct and utterances evidencing the belief of a man and woman as to their *marriage*, the marriage being material, subject to the limitations of Rule 181, (*post*, § 1537). — (W. § 268.)

Distinguish the use of *reputation* as a Hearsay exception (Rule 147, Art. 3, *post*, § 1066).



Par. (c) conduct and utterances of parents evidencing their belief in the *legitimacy* of a child. — (W. § 269.)

Distinguish the use of hearsay statements of *family history* (Rule 140, *post*, § 980).

Par. (d) conduct and utterances evidencing a person's belief in facts of his past life, where his *identity* is material. — (W. § 270.)

[*Par. (e)* conduct and utterances of a *testator* evidencing his belief as to the existence or contents of a will alleged to be lost or to be altered after execution; subject to the limitations of Rule 153, Art. 4 (*post*, § 1218) as to the hearsay use of such utterances.]¹ — (W. § 271.)

Par. (f) conduct and utterances of *parties to a contract* or other transaction evidencing their belief as to the terms of an oral transaction or a lost written one, whenever under the circumstances the risk of an improper hearsay use seems not worth considering. — (W. § 272.)

Illustration. In an action on a policy of accident insurance conditioned on the continuance of M's employment by R, the conduct of M and R is evidence of their belief and therefore of the fact that the employment had terminated.

Cross-reference. The rule as to parol evidence may here be involved (Rule 217, *post*, § 1926).

[ART. 4. *Consciousness of Innocence.* The conduct and utterances of an accused person, indicating circumstantially a consciousness of his innocence of the crime charged, are admissible in his favor.]² — (W. § 293.)

Illustration. The usual example is the accused's refusal to escape when it is in his power.

Cross-references. (1) For the use of statements explaining *possession of stolen goods*, see Rule 114, Art. 4 (*post*, § 628).

(2) For the use of other *sundry statements* of an accused, see Rule 155, Art. 2 (*post*, § 1245).

¹ This rule is in many States not law.

² The great majority of Courts repudiate this rule.

SUB-TOPIC C:

PRIOR OR SUBSEQUENT KNOWLEDGE, ETC.

RULE 64. *General Principle.* A knowledge or belief at 295 a particular time may be evidenced by the existence of a knowledge or belief at a prior or subsequent time, within limits depending upon the circumstances of each case.

TOPIC VII:

SIMILAR OFFENCES, OR OTHER ACTS, AS EVIDENCE OF
KNOWLEDGE, DESIGN, OR INTENT

RULE 65. *General Principle.* A prior or subsequent act of 297 a party, similar to the one charged as the source of criminal or civil liability, though it may be inadmissible to evidence the party's character by reason of Rule 43, Art. 1 (*ante*, § 219), is nevertheless admissible by reason of Rule 43, Art. 2 (*ante*, § 220), in so far as it is relevant to evidence the party's knowledge, intent, or design, if such is in issue or relevant, subject to the following provisions: — (W. §§ 300, 305.)

Cross-references. See also the rules for *inseparable crimes* (Rule 43, Art. 3, *ante*, § 221), *identity*, (Rule 68 *post*, § 334), *motive* (Rule 67, *post*, § 322).

ART. 1. *Knowledge.* A prior similar act is admissible to 298 evidence Knowledge, when the prior act would probably have led to some knowledge or warning (under Rule 62, *ante*, § 277), and the similarity of the transaction would make such knowledge or warning applicable to the case in hand. — (W. § 301.)

Illustrations. (1) On charge of uttering a counterfeit ten-dollar bank-note knowing it to be counterfeit, the accused's attempt to utter a counterfeit silver dollar one month before, and its refusal by the offeree, would be a warning as to its counterfeit nature, but not of the counterfeit nature of so dissimilar a kind of currency as a ten-dollar bill, unless the two things were originally received by the accused from the same person so that the suspicion aroused for the one would attach also to the other.

(2) On a charge of receiving a bicycle knowing it to be stolen, the accused's prior receipt of a stolen watch would not be evidential of knowledge as to the bicycle, unless both had been offered

to him by the same vendor and either the reclaiming of the former by the owner had given warning of the vendor's guilt or the repeated offer of articles unlikely to be honestly acquired by the same person would naturally arouse suspicion.

ART. 2. *Intent.* A prior or subsequent act is admissible
299 to evidence the Intent accompanying the act charged, when the other act is so similar as to the person, thing, and other circumstances that the repeated doing of it is not likely to occur without the intent in question; subject to the following distinctions:

Par. (a). A single other act may be admissible, if the similarity is sufficiently close.

Par. (b). The range of time between the acts depends upon the circumstances of each case.

Par. (c). The other acts need not be connected with the party as their author, provided some evidence has been introduced connecting him with the act charged. — (W. §§ 302, 303.)

Illustrations. (1) On a charge of larceny by making false entries in books of account kept by the defendant employee, the making of other incorrect entries in the same set of books, within a few months before and after, is admissible to negative the probability of honest mistake in figuring; if only one or two such other errors are offered, they should be limited to substantially the same transaction and period; the range of time and subject may broaden with the number of errors offered.

(2) On a charge of knowingly uttering a counterfeit ten-dollar bank-note, the utterance of other counterfeit money three times within the preceding month is admissible to evidence intent, even though it might be inadmissible under Art. 1 above to evidence knowledge, because the repetition of the instances within a short period diminishes the possibility of innocent intent.

(3) On a charge of arson of the barn of the defendant's employer, the defendant's explanation being that a horse accidentally kicked over a lamp, the breaking out of three fires in the same barn within two months preceding is admissible to negative the accidental origin of this one.

ART. 3. *Design or Plan.* Where the defendant's design
300 or plan to do the act charged is desired to be evidenced as relevant under Rule 37 (*ante*, § 177), a prior or subsequent

1

1

1

1

1

1

act is admissible to evidence the design or plan, provided the acts have such common features in their preparation, commission or other attendant circumstances as to indicate a plan to produce a result of which the act charged is a part.

Par. (a). The minimum number of such other acts, and the range of time, depend upon the circumstances of the case. — (W. § 304.)

Illustrations. (1) On a charge of murder of M by poisoning, the defendant's poisoning of A and B, shortly before, is admissible to show a plan, where A and B were the preferred beneficiaries of M's insurance and the defendant was the next to them in succession. But if the act of administering poison were conceded, and the question was as to its inadvertence, the fact of the prior deaths of A and B in a similar manner would be admissible to show intent under Art. 2 above, without requiring circumstances of common features indicating a common plan.

ART. 4. *Application of the Rule to Sundry Crimes, Torts and Frauds.* The foregoing rules of Arts. 1, 2, and 3 may be applied in issues involving crimes, torts and frauds, according as any one of the foregoing purposes is material; and under the principle of Multiple Admissibility (Rule 15, *ante*, § 42) the evidential facts, when offered for either of the three purposes, are admissible if the appropriate rule for that purpose is satisfied.

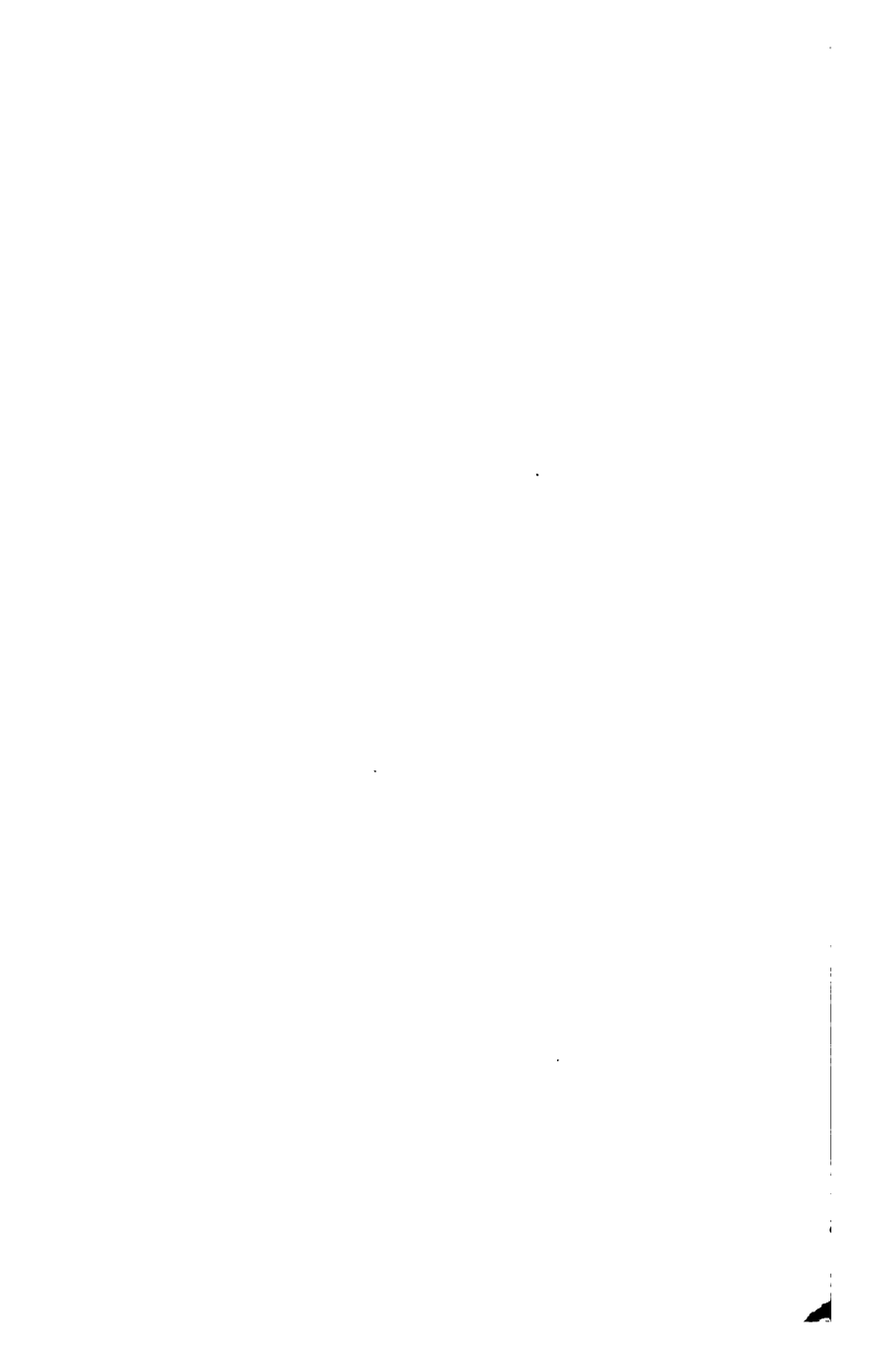
This article is thus applicable to

302 *Par. (a)* an issue of *forgery or counterfeiting*. — (W. §§ 309-318.)

303 *Par. (b)* an issue of *false pretences or representations*. — (W. §§ 320, 321.)

304 *Par. (c)* an issue of *knowing possession or receipt of stolen goods*. — (W. §§ 324-327.)

305 *Par. (d)* an issue of *embezzlement*. — (W. §§ 329-331.)



306 *Par. (e) an issue of fraudulent transfer. — (W. §§ 333-336.)*

307 *Par. (f) issues involving bribery, perjury, and sundry frauds. — (W. §§ 338-344.)*

Cross-reference. The rule that on *cross-examination to impeach a witness* (Rule 101, Art. 1, *post*, § 583) a wide range is permissible, is often meant to cover such transactions as would be admissible under the present principle.

308 *Par. (g) an issue of larceny or kidnapping. — (W. §§ 346-349.)*

309 *Par. (h) an issue of robbery, burglary, or extortion. — (W. §§ 351, 352.)*

310 *Par. (i) an issue of arson. — (W. § 354.)*

311 *Par. (j) an issue of rape, abortion, and the like. — (W. §§ 357-359.)*

Cross-references. (1) For the use of *other voluntary intercourse between the same persons*, as evidence of *motive*, see Rule 67 (*post*, § 330).

(2) For the use of *other intercourse by the woman*, as indicating the guilt of a *third person*, in *bastardy* and *rape*, see Rule 39 (*ante*, § 191).

(3) For the use of *other intercourse by the woman*, to *impeach her credit* as a witness, see Rule 102, Art. 2 (*post*, § 552).

312 *Par. (k) an issue of homicide, assault, or the like. — (W. §§ 363-365.)*

313 *Par. (l) issues involving offences against the liquor laws — (W. § 367.)*

314 *Par. (m) issues involving miscellaneous misconduct. — (W. § 367.)*

ART. 5. *Application of the Rule to Contracts and other Civil Cases.* The foregoing articles are applicable to civil cases



TOPIC VIII:

SIMILAR ACTS, AS EVIDENCE OF A HABIT, SYSTEM, USAGE, CUSTOM, OR STATUS

RULE 66. *Habit or System; General Principle.* Wherever a
316 habit or system or plan or course of conduct of a person or
class of persons is material, or is relevant under Rule 36
(*ante*, § 170) to evidence the probable doing or not doing of
a particular act, it may be evidenced by specific instances of
similar conduct, provided the other acts have such common
features with the case in hand as to indicate a plan, habit,
or course of conduct which includes it. — (W. §§ 375, 376.)

Distinguish (1) the rule against using a *party's character*
(Rules 33, 46, *ante*, §§ 146, 228), because if the particular
conduct is chiefly relevant for that purpose, and not for
the present, it would be inadmissible.

(2) the rule admitting a *habit*, as evidence of doing an act,
when proved generally or abstractly (Rule 36, *ante*, § 170);
in the present rule, the question is whether the habit or plan
itself can be evidenced by specific acts.

Illustration. Issue as to a debt contracted after notice of
dissolution of partnership; to evidence the disputed terms
of the notice sent to the plaintiff, the terms of the notice as
prepared and sent to other creditors are admissible.

ART. 1. *Contracts.* Wherever the fact or the terms of a
317 contract are material, the making of another such contract
by the promisor is admissible in the following cases:¹ —
(W. § 377.)

Par. (a) where it consists in having treated a third person
as *agent* for a similar transaction; and this rule applies
equally to a criminal case;

Par. (b) in sundry contracts, where it is a contract with
the *same promisee* under substantially similar circumstances;

¹ The rulings adopting the rule of *Par. (c)* are perhaps in
the minority.

•

•

•

— — — — —

•

•

[*Par. (c)* in sundry contracts, where it is a contract with a *different promisee* under substantially similar circumstances].

Illustrations. (1) In an action on a bill of exchange accepted by J for the defendant, the payment of several other bills by the defendant similarly accepted is admissible.

(2) In an action for plumbing work done on a house, the defendant being mortgagee, and the issue being whether he or the builder had hired the plaintiff, the fact that in building the same house the defendant had made many of the work-contracts is admissible; otherwise, probably, if the evidence related to a separate house.

Cross-reference. For the use of *business-patronage* by other customers to evidence an article's quality, see Rule 73, Art. 5 (*post*, § 354).

ART. 2. *Prescriptive Possession.* To show possession of a
318 tract of land, acts of possession of a part of it, so connected as to indicate a course of conduct as to the whole of it, are admissible. — (W. § 378.)

ART. 3. *Trade Custom or Usage.* Where the custom or
319 usage of a trade or other class of persons to do an act is material, or is relevant under Rule 36 (*ante*, § 170), instances of such customary acts by other persons of the class are admissible, provided they are sufficiently numerous and the circumstances are substantially similar. — (W. § 379.)

Illustration. In an action for damages by an actor for wrongful discharge because of his refusal to play on Sunday, the custom impliedly forming a part of his contract may be evidenced by the custom of other similar theatre-companies; but if the customary amount of cash-receipts at a Sunday performance were in issue, the customary Sunday receipts of other companies, even in the same place, might not be admissible.

Cross-reference. (1) Compare the use of *business-patronage* by other customers as evidence of an article's quality (Rule 73, Art. 5, *post*, § 354).

(2) Compare the use of the custom of other persons as to *precautions* taken at a *machine*, *railroad-crossing*, or the like, as evidence of its *dangerous* or *safe* nature (Rule 73, Art. 5, *post*, § 354).

Distinctions. (1) Distinguish the rule as to evidencing a custom by *opinion* testimony (Rule 173, *post*, § 1450), or by a single instance (Rule 179, *post*, § 1514).

(2) Distinguish the parol-evidence rule as to an *oral custom* forming part of a written contract (Rule 217, *post*, § 1937).

ART. 4. *Prior or Subsequent Habit, Custom, or Status.*
 320 The prior or subsequent existence or nature of a custom, habit, or personal relation or status is admissible to evidence its existence or nature at a particular time; the range of time depending on the circumstances of each case. — (W. § 382.)

Illustrations. This rule may be applied to the *mode of conducting a business*, the *possession or ownership of land or chattels*, a condition of *solvency* or of *indebtedness* or of *coverture* or of *residence*, the *incumbency of office*, etc.

ART. 5. *Habit of Handwriting or Spelling.* The habit or
 321 style or type of a person's handwriting or spelling may be evidenced by particular instances exhibiting it; subject to the limitations of Rule 177 (*post*, § 1475). — (W. § 383.)

TOPIC IX:

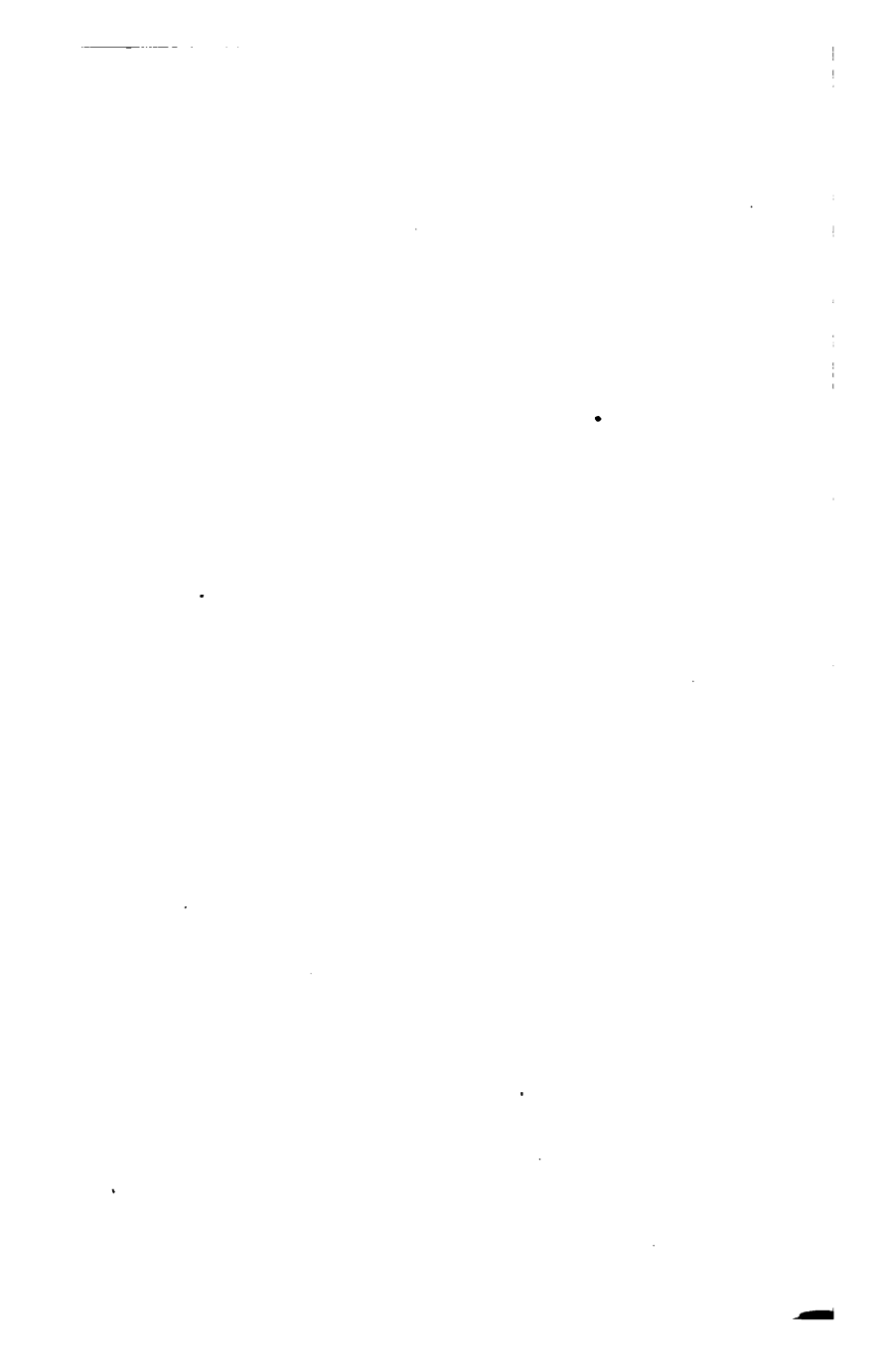
EVIDENCE TO PROVE EMOTION (MOTIVE, FEELING, PASSION)

RULE 67. *General Principle.* Whenever a person's motive
 322 is material, or is relevant under Rule 38 (*ante*, § 185) to evidence the doing or not doing of an act, the motive may be evidenced

- (A) by *external circumstances* adapted to stimulate it;
- (B) or by his *conduct* or *words* expressing it;
- (C) or by its prior or subsequent existence. — (W. §§ 385-387.)

Par. (a). *Definition.* Motive signifies the emotional
 323 condition of the person impelling him towards or against that class of acts. The circumstances adapted to stimulate this emotion are only evidential of the actual motive.

Illustration. A is charged with murder. The fact that he was a man of wealth is evidence that the motive of a desire to obtain money by the murder did not exist; and the fact that the deceased had seduced A's sister is evidence that the motive of revenge or hate did exist.



ART. 1. *A: Circumstances Tending to Excite an Emotion.*

324 *General Principle.* Any circumstance which by possibility could in human experience tend with others to excite the emotion in question is relevant; provided as follows:— (W. § 389.)

Par. (a) that there must also be some possibility of the party's knowledge of the exciting circumstance.

Par. (b) that the communication of the exciting circumstance to the party as true is admissible, even though the circumstance had not in truth occurred. — (W. § 390, n. 6.)

Distinction. Where under *Par. (a)*, the defendant's belief in *e. g.* the seduction of his wife by the deceased is offered by the defendant in mitigation, his belief and passion are evidenced by the communication, and the contradiction of the fact of seduction itself would be immaterial in rebuttal; but otherwise for the purpose of discrediting the witness reporting the seduction to him (Rule 107, *post*, § 568).

325 ART. 2. *Criminality does not exclude.* On the same principle as in Rule 43, Art. 2 (*ante*, § 220), a circumstance otherwise relevant is not inadmissible because of its criminal quality nor of any other feature capable of violating the principle against Undue Prejudice (Rule 166, *post*, § 1390); but the trial judge may take such aspects into consideration; and the circumstances of each case control, being incapable of reduction to rule. — (W. §§ 390, 391.)

Illustrations. For *killing*, the emotion may be sexual jealousy, excited by a husband's opposition to a liaison; or may be a desire to prevent discovery of a former crime or to evade pursuit for it, this desire being evoked against the deceased by one of numerous possible circumstances; or may be a sympathy with a third person having the desire to kill. But when such relevant circumstances are slight in their connection and strong in likelihood of undue prejudice, there is ground for excluding them.

326 ART. 3. *Motive in Civil Cases; Pecuniary Motive.*¹ In civil cases where the doing of an act is in dispute, the appropriate motive is always admissible, and the circumstances

¹The further examples of pecuniary motive, cited in W. § 392, need no place in a code.

that tend to excite it under the circumstance of such cases. — (W. § 392.)

Illustrations. (1) A's lack of money is admissible to show that B was probably unwilling to lend or sell to him.

(2) Where the price or the identity of an article sold is in issue, its market value is admissible to show that the party was probably unwilling to agree to pay more.

Distinguish the inference as to *capacity* to lend, from lack of money (Rule 35, *ante*, § 169), and as to *larceny* of money, from the subsequent possession of it (Rule 41, *ante*, § 201).

ART. 4. *B: Conduct Exhibiting an Emotion. General*
327 *Principle.* Any conduct which by possibility could in human experience indicate the operation of the emotion in question is admissible; subject to the rule of Art. 2, *supra* (§ 325). — (W. § 394.)

ART. 5. *C: Prior and Subsequent Emotion. General Prin-*
328 *ciple.* The existence of a specific emotion at a prior or a subsequent time is admissible to evidence its existence at the time of the act in question; the range of time depending on the circumstances of each case. — (W. § 395.)

ART. 6. *Hostility; Sexual Passion.* The foregoing principle
329 applies without further qualification

Par. (a) to emotions of *hostility* or the reverse, towards a particular person, as evidencing an act of *corporal violence*. — (W. §§ 396, 397.)

Distinctions. Distinguish (1) former *threats* of a *defendant* as evidence of a Design to injure (Rule 59, *ante*, § 267) or acts of violence as evidence of Intent (Rule 65, *ante*, § 312);

(2) former *threats* of a *deceased* as evidence of a Design to injure (Rule 37, *ante*, § 178) or of a Belief in probable aggression (Rule 37, *ante*, 182);

(3) former *litigation* as evidencing a Motive for injury (Rule 67, *ante*, § 325).

Par. (b) to sexual emotions towards a particular person,
330 as evidencing a *rape, seduction*,¹ etc. — (W. §§ 398-402.)

Distinctions. Distinguish the following other rules:

¹ Some Courts here exclude subsequent acts. Some Courts have no consistent rule.



(1) In *seduction, bastardy, breach of marriage-promise*; the woman's acts of unchastity with *other persons*, as affecting the damages (Rule 49, *ante*, § 239) or as evidencing another man's *paternity* (Rule 39, *ante*, § 191), or as impeaching her *testimonial credit* (Rule 105, Art. 2, *post*, § 552).

(b) In *rape*; the woman's acts of unchastity with other persons, as evidencing her *disposition to consent* (Rule 47, *ante*, § 229); the man's former attempt on the *same woman*, as also evidencing intent (Rule 65, *ante*, § 311), and his former assault on *another woman* as evidencing his design (Rule 65, *ante*, § 311).

ART. 7. *Malice, in Defamation.* Where in an action for
331 defamation the defendant's malice is in issue as affecting privilege or damages, other utterances of the defendant exhibiting ill-will [are admissible,

whether defamatory *per se* or not, .

and whether prior or subsequent to the time of action begun,

and whether on the same or a different subject,

and whether already recovered for or not,

and whether barred by limitation or not;]¹ (—W. §§ 403-406.)

[*Par. (a)* provided that on the circumstances of each case the trial judge may exclude any utterances which are likely, by reason of any of the above circumstances, to violate the principles of preventing Unfair Surprise (Rule 161, *post*, § 1325), or Excessive Confusion of Issues (Rule 165, *post*, § 1383), or Undue Prejudice in an improper award of damages (Rule 166, *post*, § 1390).]

TOPIC X:

EVIDENCE TO PROVE IDENTITY

RULE 68. *Definition.* Identity is the quality or condition
333 of actual sameness between two persons or things separately observed at separate times or places. It is evidenced by comparing common marks, existing in the supposed separate persons, with reference to the probability of the two persons

¹ The rule differs in different Courts; most concur in repudiating these various qualifications; the proviso gives sufficient concession to them where needed.



being in reality one only. Where a certain mark is commonly found in many persons, its presence in two is only slightly indicative of their identity. Hence, the relevancy of one or more facts offered as identity-evidence depends on the degree of necessariness of their association with a single object only. — (W. §§ 410-412.)

ART. 1. *General Principle.* A fact or group of facts offered
334 as evidence of identity of two supposed persons is relevant wherever the mark does not in experience apply to so many persons that the chances of the two supposed persons being one are too small to be appreciable. — (W. §§ 412-414.)

Distinctions. In practice, no question of relevancy ought to be raised; for the only important question can be as to the *sufficiency* of all the evidence to go to the jury (Rule 227, *post*, § 2002) or as to the *presumption* of identity arising from certain single facts, such as a name (Rules 228, *post*, § 2082).

Illustration. The correspondence of boot-size in the murderer and the defendant would always be admissible as relevant; but might not be sufficient evidence of identity if there were none else.

Cross-reference. For *traces* as evidence (foot-prints, blood-marks, etc.), see Rule 41 (*ante*, § 197). For identity of *chattels*, see Rule 70 (*post*, § 338).

ART. 2. *Criminality of Act immaterial.* The criminality of
335 an act of the defendant otherwise relevant does not exclude it; in accord with the general principle of Rule 43, Art. 2 (*ante*, § 220). — (W. § 414.)

ART. 3. *Hearsay.* Under Rule 155, Art. 3 (*post*, § 1255),
336 the fact that a person's utterances, relevant to identify circumstantially, might be excluded by the hearsay rule if offered testimonially, does not make them inadmissible. — (W. § 413, n. 9 and § 416.)

Illustration. A conversation about a murder, alluding to it in the past tense, might be admissible to fix a date.

SUB-TITLE III:
EVIDENCE TO PROVE FACTS OF EXTERNAL
INANIMATE NATURE

RULE 69. *Definition and Classification.* When a fact of
337 inanimate external nature (*i. e.*, not a human act, nor a
human quality or condition or relation) is material or relevant,
the principles of relevancy affecting the modes of evidencing
it are classified into four groups:

I. Identity (*e. g.* whether a machine sent was the same as
the one received).

II. Occurrence of an Event (*e. g.* whether a tree fell).

III. Existence or Persistence in Time (*e. g.* whether a
highway-defect existed at the time in issue).

IV. Tendency, Capacity, Quality, Cause, or Effect, (*e. g.*
whether a hole in a sidewalk was dangerous). — (W. §§ 430-
432.)

TOPIC I: IDENTITY

RULE 70. *General Principle.* Identity of a thing, place, etc.
338 may be evidenced upon the same principles as identity of a
person (Rule 68, *ante*, §§ 333-336). — (W. § 415.)

TOPIC II: OCCURRENCE OF AN EVENT

RULE 71. *General Principle.* There is no specific rule for
339 circumstantially evidencing the occurrence of an event. —
(W. §§ 435, 436.)

(*Reason.* The circumstantial evidence for the occurrence
of an event either is so varied and so free from difficulties
that no specific rule is necessary or possible; or it involves
one or another of the ensuing inferences (cause, tendency,
etc.) and the rules applicable thereto. Moreover, testimonial
(and opinion) evidence is commonest for evidencing the oc-
currence of an event.)

TOPIC III: EXISTENCE OR PERSISTENCE IN TIME

RULE 72. *General Principle.* The existence at a particular
 340 time of an object, or of a condition or quality of it, may be
 evidenced by its prior, subsequent, or concomitant existence
 in whole or in part; subject to the ensuing details and
 qualifications:— (W. § 437.)

ART. 1. *Existence, from Prior or Subsequent Existence.*
 341 The prior or subsequent existence of an object, or of a con-
 dition or quality thereof, is admissible, unless too remote from
 the time in issue, in view of the nature of the thing and the
 circumstances of the case, and calculated to cause Excessive
 Confusion of Issues, Unfair Surprise, or Undue Prejudice
 (Rules 161, 165, 166, *post*, §§ 1325, 1383, 1390).

Illustrations. The existence of a broken plank in a sidewalk
 on Jan. 31 is admissible to evidence its existence there on
 Jan. 7, unless the circumstances indicate other strongly
 probable explanations. But there can seldom be ground for
 exclusion, on this ground of mere irrelevancy, in cases of high-
 ways, machines, etc.; it is only where the possible undue
 prejudice, etc., overrides the slight relevancy that exclusion is
 justifiable.

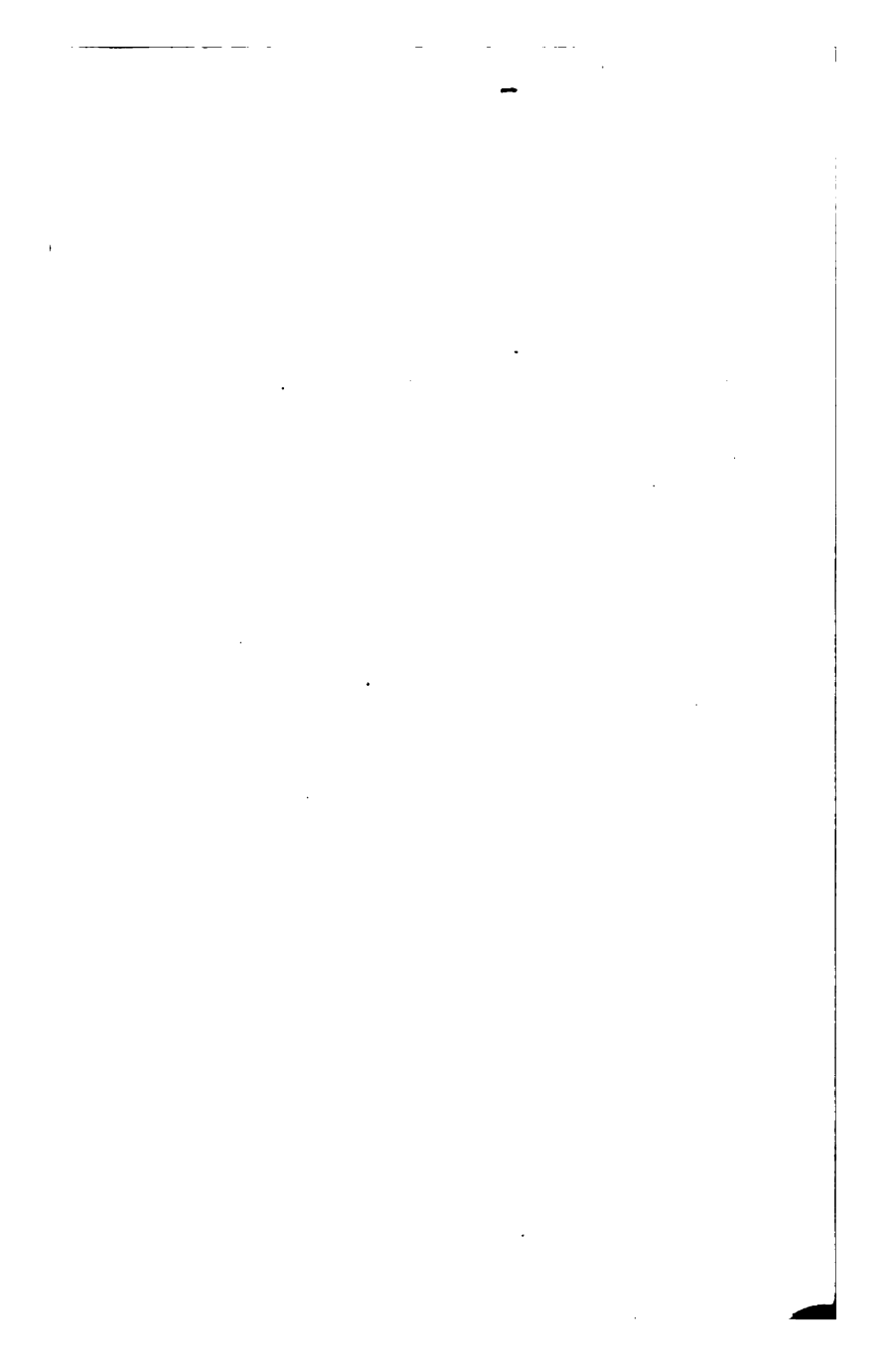
Distinctions. (1) The *subsequent repaired* condition of a place
 may be offered to evidence an admission of negligence (Rule
 118, Art. 2, *post*, § 647).

(2) The *prior dangerous* condition of a place may be
 offered to evidence the owner's knowledge of it (Rule 62,
 Art. 7, *ante*, § 284).

(3) A *photograph*, otherwise admissible (Rule 93, Art. 2,
post, § 480), may be excluded under the present rule.

ART. 2. *A Whole, evidenced by its Parts.* The existence
 342 or quality or condition of an object or place may be evidenced
 by its concurrent existence or quality or condition in a part
 thereof so related that similarity is probable; and this
 includes the evidencing of a lot or mass by sample.— (W.
 §§ 438-440.)

Illustrations. The condition of a building-stone, alleged
 to be rotten, may be evidenced by the condition of another,
 where the influences or the origin was substantially similar.



TOPIC IV:

TENDENCY, CAPACITY, QUALITY, CAUSE, OR EFFECT

RULE 73. General Principle. To evidence the tendency,
344 capacity, quality, or condition of a place or object, or its relation as cause or effect to something else, other specific occurrences indicating such a tendency, cause, etc., are relevant, provided the circumstances of the other instances and of the case in hand are substantially similar in all respects that might supposedly affect the matter in question.— (W. § 442.)

Illustrations. (1) To prove that the plaintiff's illness was due to the gas that escaped into his house from a leak in the defendant's gas-main, the similar illness at the same time of the other inmates of the same house would be relevant; but the similar illness of persons living in other houses on the same street might not be relevant, because the circumstances of occupation, drainage, personal health, etc., affecting the cause of illness, might be substantially different in the other houses.

(2) To show that a certain boiler was not dangerously likely to explode at a certain pressure of steam, other instances of non-explosion of boilers at the same pressure would be relevant, provided the other boilers were substantially similar in type, age, and other circumstances affecting strength.

ART. 1. Details of the Rule. In employing this Rule, the
345 following considerations, as respects logical relevancy and the form of inference, apply:

Par. (a). The other evidential instances may be obtained by observation of data that occurred independently, or by artificial *experiments* prepared by the observer.— (W. § 445.)

Illustration. The instances of other boiler-pressures, in Illustration (2) § 344, might be obtained by experiment with boilers selected and prepared for the purpose, or by observation of what had occurred in the ordinary factory work at other times and places before the occurrence in issue.

Distinguish the exclusion of experiments on other grounds; particularly, of

(1) the inconvenience of making them in the court-room (Rule 123, *post*, § 730).

1. 1. 1.

1.

1.

1.

1.

(2) the privilege against self-crimination, where an experiment on the defendant himself is desired (Rule 203, *post*, § 1737).

346 *Par. (b).* No minimum *number of instances* can be fixed; the number affects only the weight of the evidence. — (W. §§ 446, 447.)

347 *Par. (c).* The tendency, cause, etc., may be evidenced by comparison of *contrary sets of instances*. — (W. § 442, n. 1.)

Illustration. To show that an embankment was the cause of silting-up of a harbor, instances may be admitted of other harbors on the same coast where no embankment existed and no silting-up occurred.

348 *Par. (d).* To *rebut* the probative effect of instances admitted under this rule, the opponent may introduce

1. other instances in which the contrary effect was found;
2. or other instances in which the same effect was found, with a different cause;
3. or other circumstances showing a different cause for the same instances. — (W. § 449.)

Illustrations. (1) In an action for injuries by vibration to buildings at the east end of a bridge, evidenced by instances of several buildings at that end, the opponent may show instances of buildings remaining uninjured at the west end, where the vibrations were stronger (Method 1); and may show that the presence of a railway track at the east end explained those instances (Method 3).

(2) In a prosecution for the death of M caused by poisoned meat, the defendant may show that other persons eat of the same dinner without being ill (Method 1), and that on the next day M was similarly ill after a dinner not containing meat (Method 2).

349 [ART. 2. *Limitations of Policy.* Wherever, in the circumstances of the trial in hand, the evidencing of such other instances would violate the principles of preventing Unfair Surprise, Undue Prejudice, or Excessive Confusion of Issues (Rules 161, 165, 166, *post*, §§ 1325, 1383, 1390), they may be excluded in the trial Court's discretion, under Rule 18 (*ante*, § 52)]; [and the trial Court may require, under Rule 161, Art. 1



(*post*, § 1326), to avoid surprise, that the offering party shall have given notice of particulars to the opponent before trial].¹
— (W. §§ 443, 444.)

Illustrations. In Illustrations (1) and (2), *supra*, § 344, the judge might exclude the instances, otherwise relevant, if on the circumstances it appeared that the trial would be unduly complicated by the number of witnesses involved, their impeachment, etc., in view of the slight utility of the evidence compared with the other available evidence in the case; or if it appeared that the details of the other illnesses would excite undue prejudice against the defendant; or he might admit a limited number of instances, on motion made before trial specifying the expected evidence and the witnesses thereto.

ART. 3. *Applications of the Rule to Material Effects as*
350 *Evidence.* The foregoing rules are applicable to

Par. (a) the tendency, capacity, quality, etc., of a factory, stream, railroad, sewer, machine, gas, tool, weapon, vehicle, or other substance, as evidenced by other instances of the *effects* produced by it on *inanimate* matter. — (W. § 451.)

Illustrations. See Illust. (2), § 344, and Illust. (1), § 348, above.

351 *Par. (b)* the cause of a fire by a steam-engine, or the defective construction or condition of the engine causing it, as evidenced by their instances of its operation so as to emit burning coals;

(1) [*provided* that for evidencing a defective construction or condition, and not merely a capacity to cause fire, greater probative force in the instances may be required.]]

(2) [And *provided* that instances from other engines may be used wherever their construction or condition is similar;

¹The clause in double brackets is not yet law anywhere, except in England and Canada, but ought to be. The other part, as it stands, is law in a few jurisdictions only, especially Mass. and N. H., where the trial judge's discretion (*ante*, § 49) controls. Of the remaining jurisdictions, the majority ignore this Article, by always admitting a specific class of evidence if relevant under Art. 1; the minority enforce this Article, by always excluding a specific class of evidence on this ground.



and such similarity is presumed for engines of the same owner or lessor.]¹ — (W. §§ 452-456.)

ART. 4. *Applications of the Rule to Corporal Effects as*
352 *Evidence.* The foregoing rules are applicable to

Par. (a) the tendency, capacity, quality, etc., of a weapon, gas, drug, food, liquor, or other substance, as evidenced by other instances of the effects produced on a human or animal body. — (W. § 457.)

Illustrations. See Illust. (1), § 344, and Illust. (2), § 348, above.

353 [*Par. (b)* the tendency or nature, harmful or the reverse, of a machine, highway, building, track, or other place, by the occurrence or non-occurrence of such harm to other persons on other occasions.]² — (W. § 458.)

Illustration. To show that a stairway was dangerous by reason of a loose board, two other instances on the same day of persons being tripped by it and falling, would be relevant; and in rebuttal the fact that a thousand persons a day for a month had passed over it without falling would also be relevant, provided it could be evidenced without too many witnesses.

Distinctions. Distinguish (1) the use of other injuries to show notice of the defect to the owner (Rule 62, *ante*, § 284);

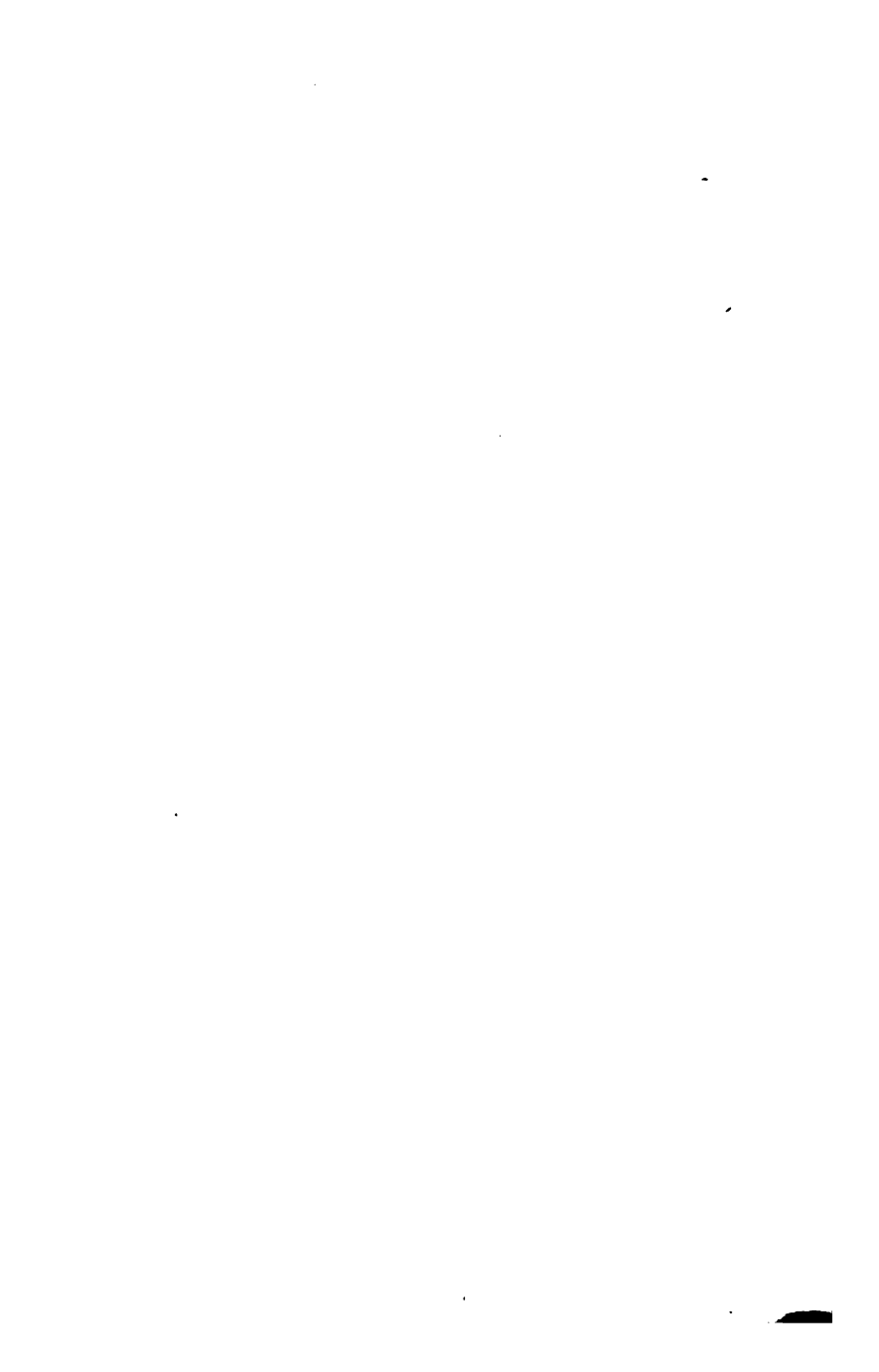
(2) the *presumption of negligence* from the occurrence of harm (Rule 228, *post*, § 2062);

(3) the inference of an *admission of negligence* by making subsequent repairs (Rule 118, Art. 2, *post*, § 647).

ART. 5. *Applications of the Rule to Mental Effects as*
354 *Evidence.* The foregoing rules are applicable to

¹ The first proviso is not enforced by any Court, but might well be. The second proviso is not law in several jurisdictions when the engine which (if any) must have caused the fire is identified; but this is unsound. The presumption of similarity is not found in some Courts.

² Most Courts apply the rule thus. Some reject it, on the principle of Art. 2 (*supra*, § 349). Some require, in applying the general principle of this Rule 73 (*supra*, § 344), express testimony to sameness of condition, where the other instances were at a time much before or after. Some exclude instances of the non-occurrence of harm, thus ignoring the principle of Art. 1, *Par. d*, *supra*, § 348 (Method 1).



TITLE II: TESTIMONIAL EVIDENCE

RULE 74. *Classification of Testimonial Evidence.* Testi-
360 monial evidence, as defined in Rule 24, Art. 1 (*ante*, § 106),
gives rise to different classes of rules, divided according to
the processes of inference involved, as follows:

I. Rules for admitting the testimonial assertion to be
introduced in the first instance, *i. e.* *Witness-Qualifications*;

II. Rules for admitting facts that diminish the credibility
of a testimonial assertion already admitted, *i. e.* *Witness-*
Impeachment;

III. Rules for restoring the credibility of a testimonial
assertion already impeached, *i. e.* *Witness-Rehabilitation*. —
(W. §§ 475-477.)

ART. 1. *Classification of Testimonial Qualifications.* The
361 rules for Witness-Qualifications are further divided, accord-
ing to the elements of a testimonial assertion, as follows:

I. Rules excluding a witness who lacks the *capacity* to give
any testimony at all; of which there are three sorts,

(A) Organic Capacity (mental derangement, mental
immaturity, moral depravity);

(B) Experiential Capacity;

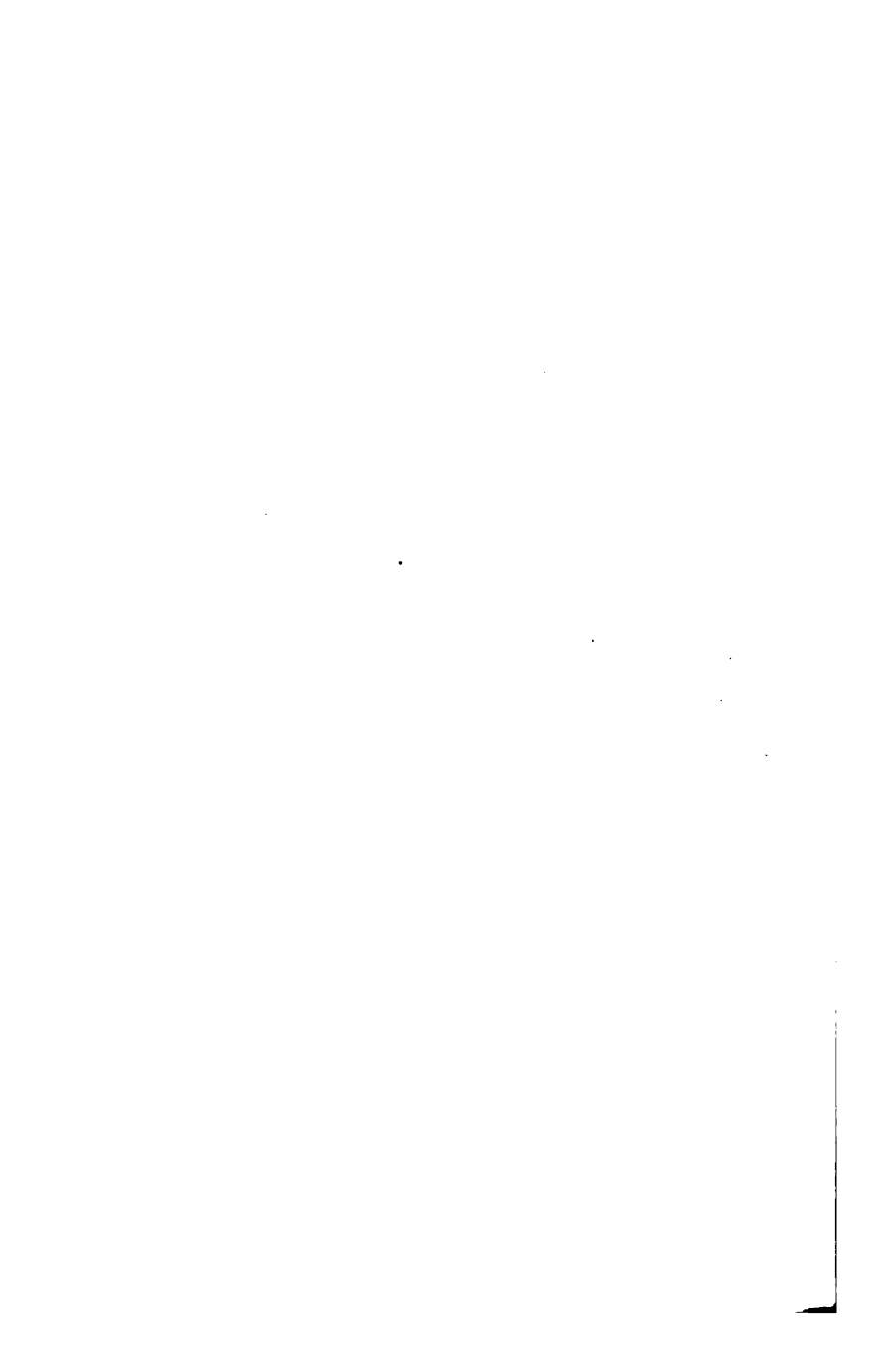
(C) Emotional Capacity (pecuniary interest, domestic
relationship).

II. Rules excluding a witness who as to specific testimony
lacks one of its necessary testimonial elements, *i. e.*

Observation,

Recollection,

Narration (or Communication). — (W. § 478.)



SUB-TITLE I: TESTIMONIAL QUALIFICATIONS

INTRODUCTORY RULES

362 **RULE 75. *Time of Qualifications.*** The time of giving testimony is the time when the qualifications must exist; for a deposition, this is the time of taking it. — (W. § 483.)

363 **RULE 76. *Burden of Proof of Qualifications.*** The burden of proving lack of organic or emotional capacity by virtue of some rule herein named is on the opponent; in all other respects, the offering party must prove the witness' qualifications; subject to the exceptions hereafter specifically named. — (W. § 484.)

364 **RULE 77. *Mode of Proof of Qualifications.*** The witness' lack of qualifications may be made to appear in one or more of four ways:

Par. (a) from his behavior before beginning testimony;

Par. (b) from a *preliminary questioning*, by either party or the judge, before beginning of his testimony;

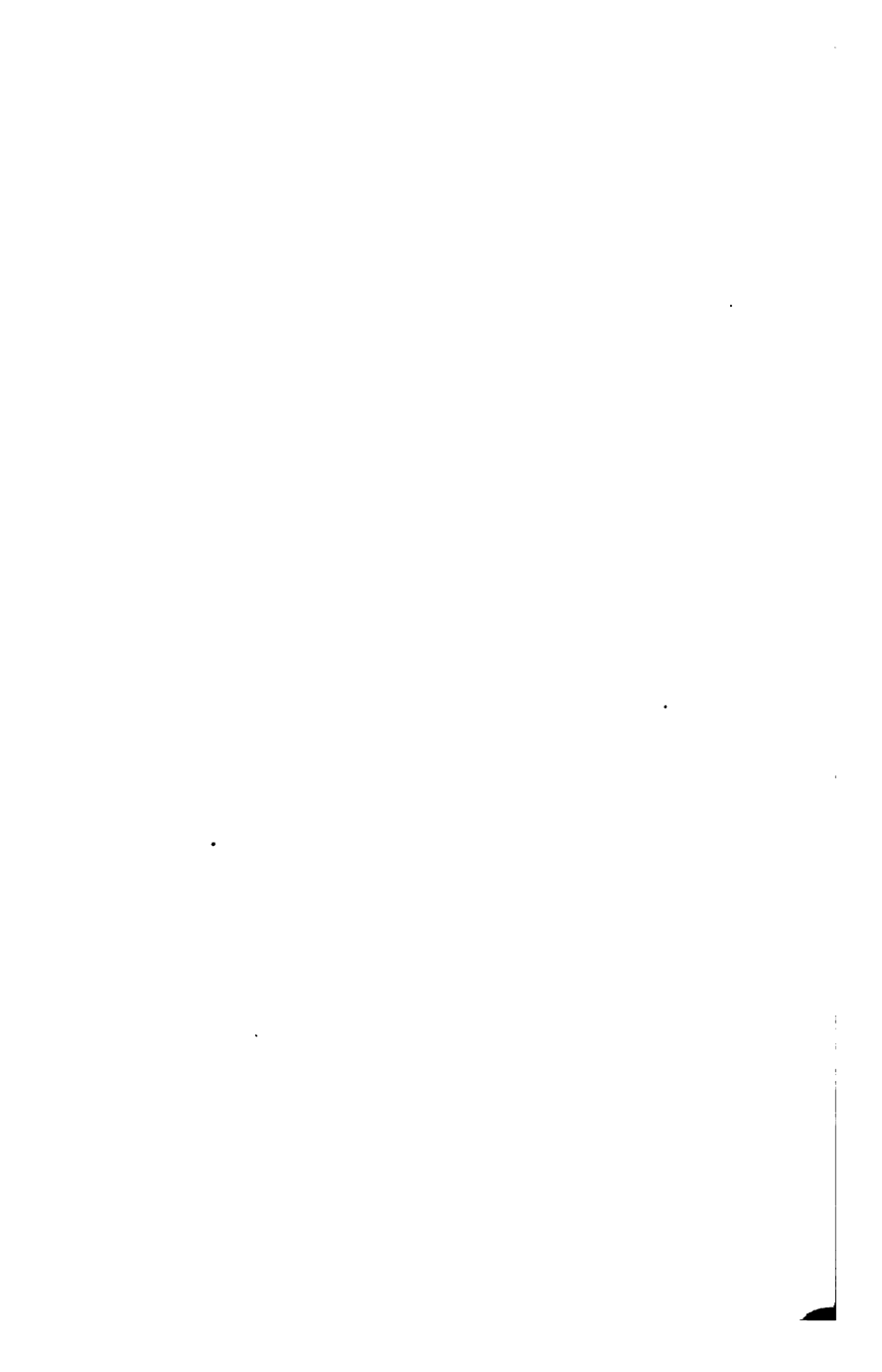
Par. (c) from *other witnesses*, before beginning of his testimony;

Par. (d) from his answers *after testimony* begun;

All of these are subject to specific exceptions hereafter named. — (W. § 485.)

365 **RULE 78. *Time of Objecting to Qualifications.*** The time of objecting to a witness' qualifications is

Par. (a) for testimony *at trial*, before testimony begun, or so soon after as the ground of objection becomes known;



Par. (b) for deposition before trial, at the time of taking it, so far as the ground of objection was then known and might have been obviated before trial, as provided by Rule 20, Art. 1 (ante, §§ 78-80).

RULE 79. *Who determines Qualifications.* The judge
366 determines the qualifications of a witness, on the principle of Rule 229 (*post*, § 2101).

TOPIC I: ORGANIC CAPACITY

SUB-TOPIC A:

MENTAL DERANGEMENT

(INSANITY, IMBECILITY, DISEASE, INTOXICATION)

RULE 80. *General Principle.* No person is disqualified as a
368 witness by reason of insanity, imbecility, disease, intoxication, or any other form of mental derangement, except insofar as his condition precludes substantially all trustworthiness in his powers of observation, recollection, or narration, on the specific matter to be testified.¹ — (W. §§ 492-495, 498, 500.)

Cross-reference. For confessions while intoxicated, see Rule 122, Art. 5 (*post*, § 715).

ART. 1. *Trial Court determines.* A witness' disqualification
368 on this ground depends on the circumstances of the particular case and witness. — (W. § 496.)

Cross-reference. For judicial discretion in general, see Rule 18 (*ante*, § 49).

ART. 2. *Capacity presumed.* The opponent has the
369 burden of proving the witness to lack capacity, by one of the methods named in Rule 77 (*ante*, § 364); and a judgment of committal to an asylum for insane raises a presumption of incapacity. — (W. § 497.)

SUB-TOPIC B: MENTAL IMMATURETY (INFANCY)

RULE 81. *General Principle.* No person is disqualified
370 as a witness by reason of mental immaturity, or at any par-

¹ Modern decisions all accept this principle, though few state it so broadly. The Code States and a few others have statutes of peculiar phrasing.



particular age, except insofar as he lacks substantially all trustworthiness in his powers of observation, recollection, or narration, on the specific matter to be testified.¹ — (W. §§ 505, 506, 509.)

ART. 1. *Trial Court determines.* A witness' disqualification on this ground depends on the circumstances of the particular case and witness. — (W. § 507.)

Cross-reference. For *judicial discretion* in general, see Rule 18 (*ante*, § 49).

Distinguish the *capacity to take an oath* (theological belief), which may result otherwise and is affected by special statutes (Rule 157, *post*, § 1285).

ART. 2. *Capacity presumed.* The opponent has the burden of proving the witness to lack capacity, by one of the methods named in Rule 77 (*ante*, § 364); [but a person under the age of fourteen is presumed to lack capacity.]² — (W. § 508.)

Cross-reference. For the *methods of ascertaining incapacity*, see further under the Oath (Rule 157, Art. 3, *post*, § 1292).

SUB-TOPIC C: MORAL DEPRAVITY

RULE 82. *General Principle.* A person is not disqualified by reason of moral depravity, or of any particular trait thereof, or of any fact supposed to evince such a trait. — (W. § 515.)

ART. 1. *Alienage, Race, Color, Sex, Religion.* A person is not disqualified by reason of birthplace, race, color, sex, or theological or religious profession or belief.³ — (W. §§ 516-518.)

Cross-reference. For *theological capacity to take the oath* see Rule 157, Art. 2 (*post*, § 1287).

¹ This principle is universally accepted, though seldom stated in so broad a rule. The Code States and a few others have statutes, with special phrasings.

² This presumption is generally so stated; but it is unsound to prescribe any.

³ In a very few jurisdictions, Indians, Chinese, or Negroes are disqualified, under statutes.

ART. 2. *Conviction of Crime.* A person is [not] disqualified
375 by reason of conviction of .

(a) Perjury; or,

(b) Any other crime.¹ — (W. §§ 519-524.)

ART. 3. *Self-confessed Mendacity.* No person is disqualified
376 by reason of testifying

Par. (a) in acknowledgment of crime or other turpitude.
— (W. §§ 525, 526, 531.)

[*Par.* (b) in contradiction or retraction of a prior statement by him, oral or written, private or official, sworn or unsworn.]² — (W. §§ 527-530.)

Distinguish (a) an *estoppel* in substantive law;

(b) a contradiction of an official certificate by *other witnesses* (Rule 133, Art. 5, *post*, § 905).

¹ Many States, in their statutes, retain disqualification by conviction for perjury; a few include other specified crimes. There should of course be no such exclusion.

² A few Courts still forbid a certifying officer to contradict his certificate; but this is unsound.



TOPIC II: EXPERIENTIAL CAPACITY

RULE 83. *General Principle.* Every witness must be fitted
378 by experience to comprehend and acquire knowledge on the
subject proposed to be testified. Since this experience is
relative to the subject of testimony, a person may be qualified
as to one subject and not as to another. — (W. §§ 554-556.)

ART. 1. *General and Special Experience; Qualifications*
379 *presumed.* Subjects of testimony are divided into two classes:
Those on which a sufficient experience is possessed by the
normal adult person in the community (General Experience);
and those on which a sufficient experience is possessed only
by those who have followed some special occupation, trade,
art, science, or other distinct form of activity (Special Ex-
perience; Experts). For testimony to the second class of
facts, a person lacking special experience is disqualified. —
(W. §§ 556, 559.)

Distinguish the Opinion rule (Rule 168, *post*, § 1410) exclud-
ing superfluous testimony, *i. e.* where the jury can have all the
data laid before them and do not need the witness' inferences;
that rule often excludes testimony from witnesses of only
general experience, *i. e.* qualified under the present principle;
but it also might admit testimony excluded by the present
principle.

Illustration. If the question is whether a fence was blown down
or cut down, an ordinary person who has seen it might be
qualified to form an opinion as to the cause, but the opinion
rule might confine him to stating the appearances he observed.
But if the length of the fence is in issue, the opinion rule would
allow him to state this, while the present principle might require
him to be an expert (surveyor), in so far as the precise length
in number of rods was desired.

ART. 2. *Qualifications presumed.* General experience is
380 presumed to exist in every person offered as a witness. Special
experience must be shown by the party offering the witness.
— (W. § 560.)



Illustration. To read English needs some skill acquired by experience, but that experience, being common to all members of the community, is presumed; if a specific witness is offered to testify to words seen on a placard, but he is in fact a Russian unable to read English, he is disqualified; yet the opponent is the one to prove the disqualification. But if the placard were in German, thus being a fact needing special experience, the witness' special experience must be shown by the offering party.

ART. 3. *Who is qualified as Expert.* The qualifications of
381 a particular witness as to special experience (Expert) depend on the circumstances of each witness in the case in hand.¹ — (W. § 561.)

Cross-references. For *knowledge*, as distinguished from experience, see Rule 86 (*post*, § 400).

For *stating the grounds* of an expert opinion, see Rule 83, Art. 2 (*post*, § 380), and Rule 106 (*post*, § 558).

For *hypothetical questions*, see Rule 168 (*post*, § 1416).

For *impeaching* an expert's character, see Rule 100 (*post*, § 529).

For *limiting the number* of experts, see Rule 167 (*post*, § 1401).

For *summoning experts by the Court*, see Rule 224 (*post*, § 1991).

ART. 4. *Rules for Specific Subjects (Law, Medicine, etc.).*
382 In applying the general rules of Arts. 2 and 3, the following specific rules control:²

383 *Par. (a)* For *foreign law*, the witness need not be by profession a lawyer or judge. — (W. §§ 564, 565.)

Cross-reference. See also the rule as to *knowledge* of the specific law (Rule 86, *post*, § 400), and the opinion rule (Rule 173, *post*, 1446).

384 *Par. (b)* For *medical topics* (health, sanity, poison, blood, etc.)

(1) General experience qualifies to testify to apparent conditions.

(2) Where special medical experience is needed, a general

¹ The general rule for *trial Court's discretion* (Rule 18, *ante*, § 49) leads to the same result. But few Courts to-day leave the determination to the trial Court.

² None of these are needed.



practitioner in good standing suffices for all subjects included in ordinary medical training. — (W. §§ 568, 569.)

Cross-references. See also the rule as to medical *knowledge* Rule 87, Art. 1, *post*, § 416) and the *opinion* rule as applied to sanity (Rule 169, *post*, § 1430) and to health (Rule 175, *post*, § 1462).

385 *Par. (c)* For *handwriting*, any person able to read and write is qualified. — (W. § 570.)

Cross-reference. See also the rule as to *knowledge* of the specific hand (Rule 87, Art. 3, *post*, § 418), and the *opinion* rule (Rule 177, *post*, § 1475).

386 *Par. (d)* For *value*, general experience qualifies.

Cross-reference. See the rule as to *knowledge*, which is more detailed (Rule 87, Art. 4, *post*, § 422).

387 *Par. (e).* For *speed*, general experience qualifies. — (W. § 571.)

Cross-reference. See also the *opinion* rule (Rule 175, *post*, § 1464).

TOPIC III: EMOTIONAL CAPACITY

SUB-TOPIC A: PECUNIARY INTEREST

RULE 84. *General Principle.* No person is disqualified by
388 reason of his pecuniary relation to a party or his pecuniary
interest depending on the event of the trial, except as herein
stated.

ART. 1. *Criminal Cases.* No person in a criminal case is
389 disqualified by reason of being a party, or of having any other
interest depending on the event of the trial or on the action
of prosecuting officers.¹ — (W. §§ 488, 579, 580.)

Cross-reference. For the *privilege* not to testify, see Rule 203
(*post*, § 1730).

ART. 2. *Civil Cases.* No person in a civil case is disqualified
390 by reason of being a party or of having any other interest
depending on the subject or the event of the trial. — (W.
§§ 488, 577.)

[*Par. (a) Except that the interested survivor of a trans-*
391 *action with a decedent or other person since disqualified*
is not qualified to testify against the latter's estate as to
that transaction, unless on consent or implied waiver by
*the latter's representative.]*² — (W. §§ 488, 578.)

ART. 3. *Testifying to Intent.* No person is disqualified

¹ In Georgia, a defendant is still partly disqualified. In several States there are remnants of the old rules disqualifying a co-defendant or co-indictee, and here the statutes have been variously construed.

² This exception obtains in all but four States, but is variously phrased in statutes. Some disqualify for the whole suit, others for the transaction only; some disqualify all interested persons, other the parties only; etc. The whole exception is unsound and does harm.



§ 392 to testify to his own intent or other mental state material in the case.¹ — (W. §§ 581, 1966.)

Cross-reference. See the rules as to excluding testimony to another person's intent (Rules 86, 174, *post*, §§ 405, 1457).

Distinguish the substantive law of libel, contract, etc., which may make the party's intent immaterial.

ART. 4. *Mode of Proving Disqualification.* The general 393 rules as to the mode of proving disqualification (Rules 75-79, *ante*, §§ 362-366) here apply.² — (W. §§ 583-587.)

SUB-TOPIC B: DOMESTIC RELATIONSHIP

RULE 85. *General Principle.* A person is not disqualified 395 by reason of domestic relationship to a party to the cause, unless herein expressly so declared. — (W. § 600.)

ART. 1. *Husband and Wife.* A husband or wife is [not] 396 qualified to testify on behalf of the other when the other is a party or otherwise interested, in a criminal case [or in a civil case].³ — (W. §§ 488, 605-620.)

Cross-references. For the *privilege* not to testify or be testified against, see Rule 202 (*post*, § 1710).

For *confidential communications* see Rule 206 (*post*, § 1812).

ART. 2. *Survivor's Spouse.* The husband or wife of a 397 survivor disqualified under Rule 84, Art. 2, par. (a) (*ante*, § 391) is also disqualified. — (W. § 608.)

{ ART. 3. *Parent and Child (Legitimacy).* A married father or mother may not testify to the fact of non-access [during marriage] in any proceeding where that fact is provable to

¹ Except in Alabama and possibly elsewhere.

² This is now of consequence only for the exception under Art. 2, par. (a); but the local modern practice does not always follow the common law rules.

³ The unbracketed part is the law in almost all States. For civil cases, many States retain a disqualification, variously phrased by statute. These are anachronisms.

show the illegitimacy of a child born of the mother after marriage. }¹ — (W. §§ 2063, 2064.)

Cross-references. (1) For the original rule, merely requiring *corroboration* for the mother, see Rule 180, Art. 3 (*post*, § 1521).

(2) For the presumption of *legitimacy*, permitting the non-access to be proved, see Rule 228 (*post*, § 2080).

¹ This rule is law in almost every State; in England the bracketed clause appears to be recognized. The rule is due to an historical blunder, and is senseless in policy.



TOPIC IV: TESTIMONIAL KNOWLEDGE

RULE 86. *General Principle.* The first element in testimony
400 is means of knowledge of the matter to be testified. Means
of knowledge implies a physical opportunity to use the senses
in observing. — (W. §§ 650, 656.)

ART. 1. *Knowledge not presumed.* The party offering the
401 witness must show him qualified as to means of knowledge. —
(W. § 654.)

ART. 2. *Means of knowledge specified.* The witness may
402 state the facts supplying the means of his knowledge, even
though such facts would not otherwise be admissible. —
(W. § 655.)

Cross-references. The rule of *multiple admissibility* (Rule 15,
ante, § 42) permits this, and the *hearsay rule* does not forbid
it (Rule 155, *post*, § 1240); but the rule for preventing *undue*
prejudice might always be invoked (Rule 166, *post*, § 1390).

Illustration. A witness is asked how he is able to identify
the defendant as the person present at an affray, and replies,
"Because he was the man who stole my wagon," or "Be-
cause my foreman said it was the man, etc."; here the undue-
prejudice rule is the only one that could exclude.

Distinguish the opponent's right to *cross-examine* to the means
of knowledge (Rule 106, Art. 2, *post*, § 561).

ART. 3. *Knowledge need not be Positive.* A witness is
403 qualified though his means of knowledge results only in a belief
or impression, not a positive conviction.¹ — (W. § 658.)

Cross-reference. See also the *opinion rule* (Rule 174, *post*,
§ 1457), and the rule for *recollection* (Rule 88, *post*, § 427),
which in some aspects apply to a testimonial "impression."

ART. 4. *Data must be Rational.* A witness is not qualified
404 whose means of knowledge appears to be only data not ration-

¹The rulings here are often ambiguous, owing to the
opinion rule.

ally capable of forming means of knowledge. — (W. §§ 659-663.)

Illustrations. A witness may testify to a person's *identity* from having only heard his *voice*; or to another person's *state of mind*, from having observed his conduct; and a biological expert may testify to the number of oval microbes on the point of a needle, or a medical expert to the probable duration of a heart-lesion; but in the third class of cases some Courts may (over-rashly) exclude testimony in the narrow idea that the matter is not humanly knowable, and in the fourth class may exclude it because in substantive law no recovery can be had for merely contingent injuries.

ART. 5. *Personal Observation required.* A witness is not
405 qualified whose means of knowledge was not substantially the personal observation of his own senses. — (W. § 657.)

In particular, a witness whose means of knowledge was hearsay assertions of others is not qualified;
except as follows:

406 *Par. (a)* a *public officer's* testimony to the records or acts of his subordinates or predecessors. — (W. § 665.)

407 *Par. (b)* a person using standard *scientific instruments* and formulas prepared by another person. — (W. § 665.)

408 *Par. (c)* an *expert* using the reported *data of fellow-scientists*; — (W. § 665.)

in particular, a *legal expert* who has studied printed sources of *foreign law* ¹ — (W. § 690.) and

a *medical expert* who has studied printed *medical data*. — (W. § 687.)

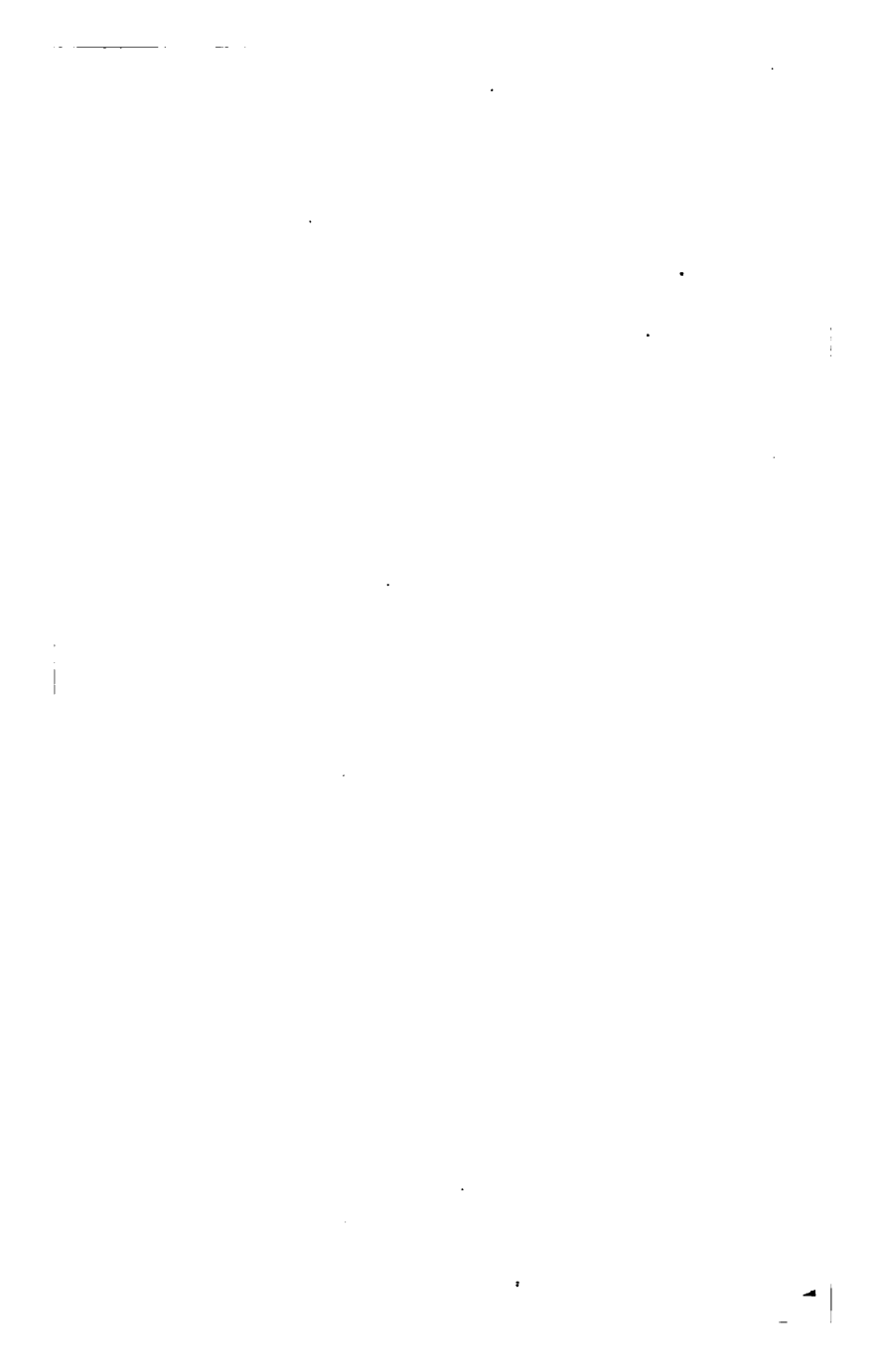
409 [*Par. (d)* a *medical expert* who has taken into consideration the statements of the patient or his attendants.] — (W. § 688.) ²

Cross-reference. For the admissibility of the *patient's own words*, under the hearsay exception, see Rule 153, Art. 1 (*post*, § 1201).

410 *Par. (e)* a person who testifies to the *contents of a document* read to him by another person, as provided in Rule 128, Art. 3 (*post*, § 823).

¹ This is perhaps more liberal than all Courts would rule.

² Some Courts refuse to go this far, making various limitations; but common sense calls for the above rule.



411 *Par. (f)* a person who testifies to his *own age*. — (W. § 667.)

Cross-reference. For the rule permitting this as a statement of *family hearsay*, see Rule 140 (*post*, § 980).

412 [*Par. (g)* a person who, having listened on the *telephone*, testifies

(1) to the *identity* of the speaker though not recognizing the voice,

(2) or to the *tenor* of the utterances though transmitted by a third person.]¹ — (W. §§ 669, 2155.)

Cross-reference. For the authentication of a telephone message, see further Rule 188 (*post*, § 1504).

413 ART. 6. *Negative Knowledge.* A witness is qualified to testify in denial who was so placed that he probably would have observed the fact if it had occurred. — (W. § 664.)

Illustration. A person waiting at a railroad crossing may testify that the whistle was not blown, because he would have heard it if it had been.

414 ART. 7. *Hypothetical Forms of Knowledge.* Where an expert has not personally observed the data on which his inference is based, they may be supplied to him by hypothetical statement, their proof being made by other evidence; according to the rules for hypothetical questions (Rule 168, Art. 3, *post*, § 1416).

The same may be done for a witness to value, who has knowledge of the class of values involved, but has not observed the object to be valued. — (W. § 653.)

415 RULE 87. *Knowledge on Specific Subjects.* A witness' qualification as to means of knowledge on a specific subject depends upon the circumstances of each witness and case; subject to the following specific rules:

416 ART. 1. *Sanity.* A witness to sanity or the reverse is qualified who has had sufficient observation of the person to form a belief as to his mental condition. — (W. § 689.)²

¹ Most Courts do not yet go so far, at least on the latter point, where some limitation to conversations with agents is usually made; but the above simple rule is strict enough.

² The phrasings vary in different Courts, but all are mere forms of words. In the Code States a statute sometimes defines.

Distinguish the opinion rule as applied to such testimony (Rule 169, post, § 1430).

ART. 2. *Reputation.* A witness to reputation must have
417 resided in the place of the reputation. — (W. §§ 691, 692.)

ART. 3. *Handwriting.* The means of knowledge of a
418 witness who testifies that a specific piece of handwriting is
or is not that of a specific person must be either

(A) the having seen that person make that writing or the
having heard him (if a party opponent) admit the making of
it; or.

(B) the having means of knowledge of that person's *style*
of handwriting, so as to compare the style with the specific
piece in issue.

The latter method may include three varieties, in each of
which the necessary elements are (1) the style of handwriting,
and (2) the identity of the writer. These three varieties are

(a) by seeing that person make other writings;

(b) by seeing writings purporting to be that person's and
otherwise known to be his;

(c) by seeing writings purporting to be that person's but
not otherwise known to be his. — (W. § 693.)

419 *Par. (a).* A witness who qualifies by having seen the
person make a writing need not have seen it done

(1) often,¹

(2) nor recently,

(3) nor in any specific quantity;

(4) and the writing may be one made by a party after
controversy begun.² — (W. §§ 694-697.)

420 *Par. (b).* A witness who qualifies by having seen writ-
ings purporting to be that other person's has sufficient
means of knowledge of the writer's *identity*

(1) if the person has *expressly admitted* making the
writing; — (W. § 700.) or

(2) if the person has by conduct (*e. g.* by paying a note)
impliedly admitted making it; — (W. § 701.) or

¹ As the rulings go, once is enough.

² This is sometimes denied; but the simple rule above does
no harm.

(3) if a *correspondence* has been exchanged, circumstantially indicating genuineness;¹ — (W. § 702.) or

(4) if the witness is a *clerk* or *custodian of records* and the writings purport to be those of an employer or other person whose writings are naturally there found.² — (W. §§ 703 704.) or

(5) if the witness, testifying to *bank-notes* or other paper currency, has found them to pass current without dispute.³ — (W. § 705.)

420 *Par. (c).* Where the witness qualifies by seeing writing not known to him to be the purporting maker's, he must be an expert in handwriting, by virtue of the Opinion rule, and the authenticity of the specimen-writings must be evidenced by other testimony, subject to the provisions of Rule 177 (*post*, § 1475).

421 *Par. (d).* When a witness is qualified by knowledge of the type of handwriting, and is desired to identify the handwriting of a specific document, the document must be *produced* before him in court; unless he has already seen it, or unless it is produced by photographic copy under Rule 93, Art. 2 (*post*, § 484), or unless other special circumstances are deemed sufficient. — (W. § 1185, notes 6-9.)

Distinction. Whether a Court will order a document to be taken from the files and sent to a deposing witness out of court is a different question.

422 ART. 4. *Value.* A witness to value need not have had a special training or occupation;⁴ but he must be

(1) familiar with the standard of value for the class of objects in question, and

(2) acquainted with the specific object to be valued — (W. §§ 712, 720.)

subject to the following distinctions and qualifications:

¹ Some Courts require more than this; the phrasing differs.

² Phrasings differ. Some Courts are less liberal; some limit the rule to ancient records.

³ Phrasings differ.

⁴ This is broader than most Courts put it.

Par. (a). For *realty*-value, the witness need

- 423 (1) not be a dealer in land;
(2) nor have had dealings;
(3) nor have heard of specific sales. — (W. §§ 714, 720.)

Par. (b). For *services*-value, the witness

- 424 (1) need not have followed the occupation of the party rendering services;¹ and
(2) may be the party himself. — (W. § 715.)

Par. (c). For *personalty*-value, the witness

- 425 (1) need not be a dealer; and
(2) may be the owner himself; — (W. § 716.)
(3) if there is a market value, he must have had the means of knowing it, by acquaintance with the transactions.² — (W. §§ 717-719.)

Cross-references. For *other sales* as evidence of value, see Rule 73 (*ante*, § 354).

For the *opinion* rule applied to value-testimony, see Rule 170 (*post*, § 1435).

For *market reports* of value as hearsay admitted by exception, see Rule 150, Art. 2 (*post*, § 1182).

¹ This is more liberal than most Courts.

² The rulings as to the last clause differ in phrasing.

TOPIC V: TESTIMONIAL RECOLLECTION

RULE 88. General Principle. The second element in testimony is recollection; and this recollection should adequately represent the impressions originally received by his observation. — (W. § 725.)

But there are no specific rules of law disqualifying for lack of recollection; in particular,

Par. (a). No specific degree or quality of vividness or certainty of recollection is required; and any "impression," "belief," or the like, may be admissible in the circumstances of the case.¹ — (W. §§ 726-729.)

Distinguish (1) an "impression" which signifies that the witness lacked any *personal observation* (Rule 86, *ante*, § 405).

(2) an "impression," "understanding," etc., which may be excluded by the *opinion* rule (Rule 174, *post*, § 1457).¹

Illustrations. A witness to a railroad collision testifies to his "impression" that the whistle was blown when the train was still 200 yards away; this is admissible, so far as it signifies merely that, though he saw and heard it, he was not positive as to the distance observed (*ante*, § 403), or is not now clear in memory (§ 428); but is inadmissible if it signifies that he speaks only from what bystanders said (*ante*, § 405), or if the opinion rule is (erroneously) applied (*post*, § 1458).

ART. 1. Specifying the Grounds of Recollection. The witness may on direct examination state the circumstances that form the special grounds of his recollection, subject to the provisions of Rule 86 (*ante*, § 402); and on cross-examination he may be required to do the same, subject to the provisions of Rules 101 and 106 (*post*, §§ 532, 558). — (W. § 730.)

ART. 2. Past and Present Recollection. A witness' recollection may be past or present.

¹ The rulings are sometimes inconsistent in appearance, because of the above distinctions.

—

.

7
:
:
:
:

.

.

.

.

(1) A past recollection must have been recorded, subject to the provisions of Rule 89.

(2) A present recollection may be revived, refreshed, or stimulated, subject to the provisions of Rule 90.¹

RULE 89. *Past Recollection Recorded.* A past recollection
431 recorded may be used, subject to precautions for securing the adequacy of the recollection and the accuracy and identity of the memorandum; as follows:— (W. §§ 734-736.)

Cross-references. For a *stenographer's notes* of testimony, compare also the rules as to *calling the stenographer* under the hearsay exception (Rule 148B, Art. 3, *post*, § 1134), as to accounting for the *witness' absence* (Rule 136, Art. 2, *post*, § 930), and as to *sameness of issues* and parties (Rule 135, Art. 2, *post*, § 919).

For a *notary's certificate*, compare the rule for admitting it as a hearsay exception (Rule 148 C, Art. 1, *post*, § 1146).

For an *attesting-witness* verifying his signature, compare the rule admitting it when he is deceased, etc. (Rule 141, *post*, § 1000). — (W. § 737.)

ART. 1. *Recollection fresh when recorded.* The memorandum
432 must have been made when the matter was fairly fresh in recollection; but the time depends on the circumstances of each case. — (W. § 745.)

ART. 2. *Accuracy of Record.* The witness must be able to
433 say that he believed the memorandum correct at that time; either (1) by now remembering that belief,
or (2) by now relying upon a habit of correctness, on the handwriting, or on other indicia.² — (W. §§ 746, 757.)

Illustrations. The second mode is usually the case for *notaries*, *attesting-witnesses*, *stenographers*, *book-keepers*, etc.

Par. (a). The witness must be qualified by *personal*
434 *observation* of the matter recorded, as required by Rule 86 (*ante*, § 405). — (W. § 747, n. 8.)

¹ There are a few Courts which still do not fully recognize the distinction.

² In Massachusetts, the record must probably have been one of a set of regular entries.

435 *Par. (b).* But the witness need not *himself have written* the memorandum, provided he saw it and knew its correctness at a time when his recollection was fairly fresh. — (W. § 748.)

436 *ART. 3. Original and Copy.* The original memorandum is required, if procurable, according to the rules for producing original writings (Rule 126, *post*, § 747); otherwise a copy may be used. — (W. § 749.)

437 *Par. (a).* This copy may be by a *different person*, provided the maker of the original also testifies. — (W. § 750.)

438 *ART. 4. Joint Testimony of Observer and Recorder.* Where one person observed the events and orally stated them to another person, and the other person duly recorded the statement, the record is admissible on their joint testimony to their respective parts.¹ — (W. § 751.)

Illustration. A wagon-driver loads iron rods, calling out the pieces at each trip to the shipping-clerk, who notes the items of the load as they are called out, but does not see the goods taken and loaded; the memorandum may be used upon the joint testimony of the driver and the clerk; because each thus furnishes one element, and both together complete all that would have been required for one person alone. If one alone testifies, the rule of *Par. (a)* applies.

439 *Par. (a).* Where either the observer or the recorder is not in court, and only the other testifies, the memorandum is admissible only if it satisfies the hearsay exception for regular entries (Rule 142, *post*, § 1002).

440 *ART. 5. Opponent's Inspection.* The memorandum must be shown to the opponent, on request, before or after use by the witness, for inspection, and for cross-examination; pursuant to Rule 161, Art. 8 (*post*, § 1345). — (W. § 753.)

441 *ART. 6. Record forms Part of Testimony.* A record duly made and used forms part of the witness' present testimony,

¹ Note that here the memorandum need not have been a regular entry, though it commonly is, and though some Courts assume that it must be.

and may therefore be shown or handed to the jury by the party offering it.¹ — (W. § 754.)

ART. 7. *Present Recollection not preferred.* A past recorded
442 recollection may be used, even though the witness has some present recollection.² — (W. § 738.)

[[ART. 8. *Past Unrecorded Recollection.* A past recollection
443 not recorded may be testified, if the subject is so simple that error is unlikely.³ — (W. § 744.)]]

Illustration. An alleged robber is freshly arrested, and at the police-station the robbed man, on seeing the person arrested, declares him to be the robber. At the time of the trial, the robbed man is unable to recall the features and identify the accused; nevertheless he, or one who heard him at the police-station, may testify to the identification as then made.

Cross-reference. This could also come in under Rule 113 (*post*, § 619).

RULE 90. *Present Recollection Refreshed.* For the purpose of
444 refreshing and improving a dormant recollection, a witness may use any artificial aid which under the circumstances is appropriate and does not seem improperly suggestive.⁴ — (W. § 758.)

Cross-reference. Where the assistance is to be made by questions from counsel, or the like, the rules for *leading questions*, and other *forms of suggestion*, apply (Rules 91 and 92, *post*, §§ 454, 461).

Par. (a). In particular, *any writing* may be used;
445 subject to the following provisions: ⁵ — (W. § 758.)

Cross-reference. For improper suggestion by *writings of counsel, depositions*, etc., see Rules 91 and 94 (*post*, §§ 454, 488).

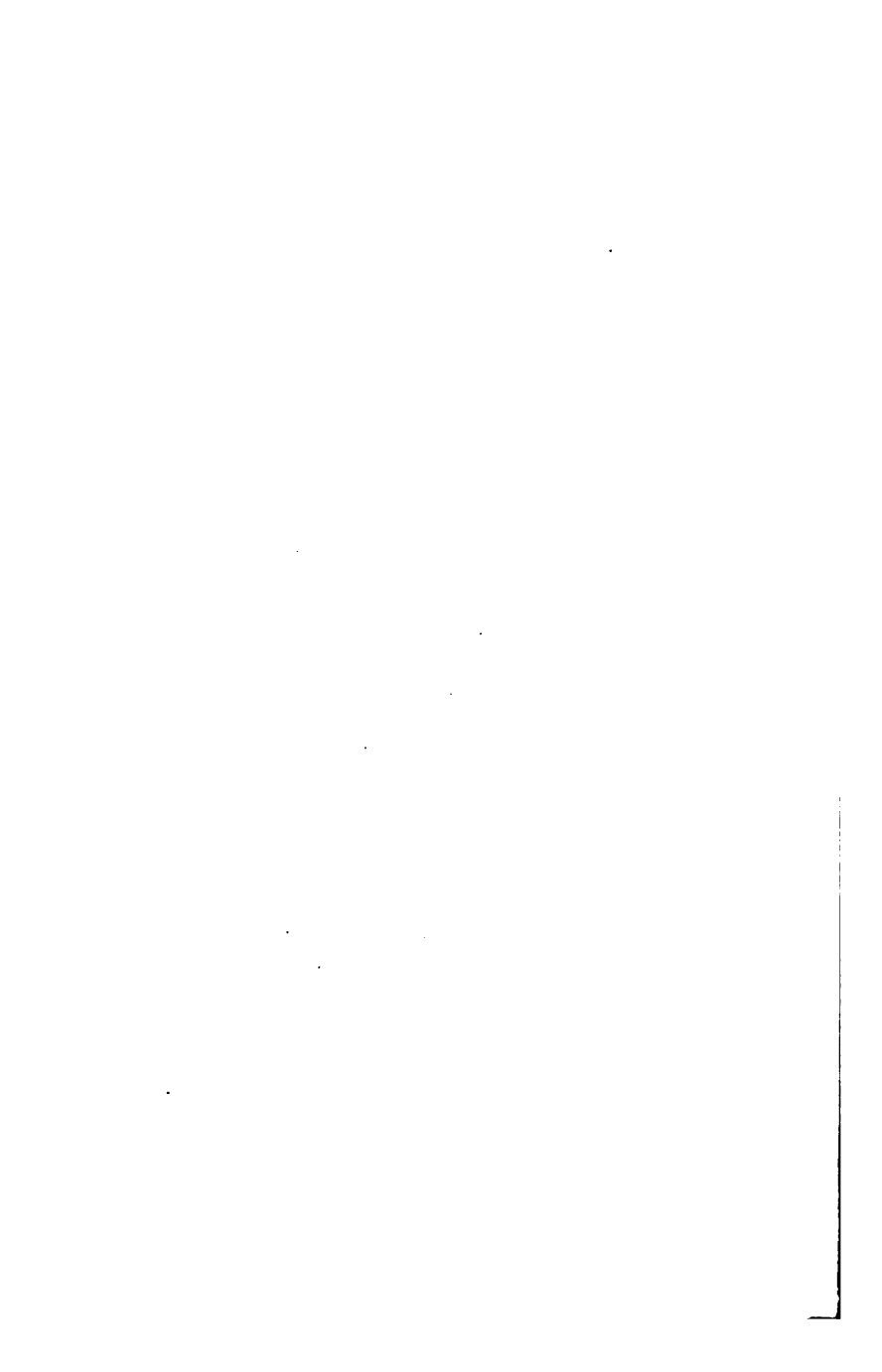
¹ Some Courts make verbal distinctions, *e. g.*, that it is not "independent" evidence; but almost all acknowledge the rule of practice.

² This is denied in the New York, Federal, and a few other Courts.

³ This is not law, except probably for the case given in illustration.

⁴ The trial Court here determines (Rule 18, *ante*, § 49).

⁵ On most of the following details, there are Courts which hold the contrary. by confusion of the subject with that of Rule 89.



ART. 1. *Writing not Made by Witness.* The writing is
446 [not] required to be one made by the witness himself.¹ —
(W. § 759.)

ART. 2. *Not an Original.* The writing is [not] required to
447 be an original.¹ — (W. § 760.)

ART. 3. *Not Made at the Time.* The writing is [not] re-
448 quired to have been made freshly after the time of the event.¹
— (W. § 761.)

Illustration. A deposition or report of former testimony may
be thus used.

Distinguish (1) the rule against impeaching one's own witness
(Rule 97, Art. 4, *post*, § 504), and

(2) the rule against using *self-contradictions* as independent
evidence (Rule 108, Art. 5, *post*, § 589), as applied to depositions
and former testimony.

ART. 4. *Opponent's Inspection.* The writing must be
449 shown to the opponent, on request, as provided in Rule 89,
Art. 5 (*ante*, § 440).² — (W. § 762.)

ART. 5. *Writing not a Part of Testimony.* The writing does
450 not become a part of the witness' testimony, and therefore
the party offering the witness is not entitled to read or show it
as evidence to the jury;² though he is compellable to show it to
the jury, on request of them or of the opponent, pursuant to
the principle of Art. 4, above. — (W. § 763.)

ART. 6. *Refreshing on Cross-examination.* The cross-
451 examining party may require a witness to refresh his
memory by a writing, subject to other applicable rules. —
(W. § 764.)

Cross-references. See the references under Art. 3, above, and
the rule for *showing a document* on cross-examination (Rule
161, Art. 8, *post*, § 1345).

¹ There are rulings erroneously omitting the "not."

² A few Courts deny or doubt this, without grounds.



TOPIC VI: TESTIMONIAL NARRATION (COMMUNICATION)

RULE 91. *General Principle.* The third element in testimony
454 is Narration (or, Communication). It should correctly reproduce and intelligibly express the witness' actual and sincere recollection.

The rules for that purpose are
either (1) rules arising from general risks affecting all forms
of testimonial utterance (Art. 1, below);
or (2) rules arising from a specific form of testimonial
utterance (Rules 92-95, below). — (W. § 766.)

ART. 1. *General Rules to prevent Improper Suggestion in*
455 *Sundry Ways.* Testimony subjected to any method of suggestion or instruction, involving substantial danger that the testimony will fail to represent the witness' sincere and actual recollection, may be excluded;¹ — (W. § 786.)
in particular, where the witness

456 *Par. (a)* Uses writings under pretence of *refreshing* recollection (as provided in Rule 90, *ante*, §§ 444-451).

457 *Par. (b)* Remains in court during the testimony of other witnesses (as further governed by Rule 162, Art. 2, *post*, § 1316); or
during an argument of counsel as to the admissibility of the witness' testimony. — (W. § 786.)

458 *Par. (c)* Is recalled for a pretended correction (as further governed by Rule 164, Art. 6, *post*, § 1380).

459 *Par. (d)* Has conferred with counsel, before the giving of testimony, for the purpose of shaping his testimony as desired. — (W. § 788.)

¹ The rule for trial Court's discretion here applies (Rule 18, *ante*, § 49).



ART. 2. *Specific Rules affecting the Form of Testimony.* The 460 rules arising from a specific form of testimony are classified according as the witness' statement varies from the simple and usual form in being

(A) not an uninterrupted narrative, but given by answers to interrogations of counsel (Rule 92); or

(B) not expressed in words, but in gestures or other symbols (Rule 93); or

(C) not uttered orally, but in writing (Rule 94); or

(D) not intelligible directly by the tribunal, but requiring assistance to interpret (Rule 95). — (W. § 766.)

SUB-TOPIC A: TESTIMONIAL INTERROGATION

RULE 92. *General Principle.* A witness' testimony may be 461 given by making answers to questions of counsel; subject to the following provisions: — (W. § 768.)

Distinctions. The following rules are independent of the present ones:

(1) For the *order of topics* and the order of *direct and cross-examination* (Rules 162-164, *post*, §§ 1350-1380).

(2) For the *right of opportunity of cross-examination*, and the exceptions (Rule 135, *post*, § 913).

(3) For the *kind of facts* admissible to impeach, on cross-examination or otherwise (Rules 101-106, *post*, §§ 532-565).

(4) For *impeaching one's own witness* on cross-examination (Rule 97, Art. 4, *post*, § 504).

ART. 1. *Leading Questions.* A leading question is one which 462 suggests the specific tenor of the answer desired from a witness presumably favorable to the party questioning, and is forbidden,

unless the circumstances of the case render it not improperly suggestive or make it nevertheless necessary;¹
— (W. §§ 769, 770.)

subject to the following provisions:

Par. (a). A question which in form

463 (1) assumes a controverted fact, or

¹ Thus the trial Court's discretion controls (Rule 18, *ante*, § 49).

(2) permits the simple answer 'yes' or 'no,'
is usually improper;
and a question which

(3) states alternatives requiring a verb in the answer
is usually not improper.¹ — (W. §§ 771, 772.)

Illustrations. (1) "What was A doing, when B stabbed him?"
this is leading as to the second clause only.

(2) "Did B stab A without saying anything to warn
him?"

(3) "State whether A did or did not stab B."

464 *Par. (b).* On *cross-examination*, a leading question is
usually not improper.² — (W. § 773.)

Distinguish (1) the ensnaring or *misleading* question on *cross-*
examination (Art. 2, *post*, § 467);

(2) the rule against asking for *one's own case* on *cross-*
examination (Rule 164, Art. 4, *post*, § 1376).

465 *Par. (c).* On *direct examination*, a leading question is
usually not improper

(1) where the witness is *hostile*, *biased*, or otherwise
unlikely to accept suggestions; — (W. § 774.) or

(2) where the matter asked about is *preliminary* and
undisputed. — (W. § 775.)

466 *Par. (d).* A leading question is usually allowable, by
necessity, where the witness

(1) has *exhausted* his *recollection*; — (W. § 777.) or,

(2) *cannot comprehend*, by reason of infancy, illness,
illiteracy, alienage, or otherwise, the subject of testi-
mony sought from him; — (W. § 778.) or,

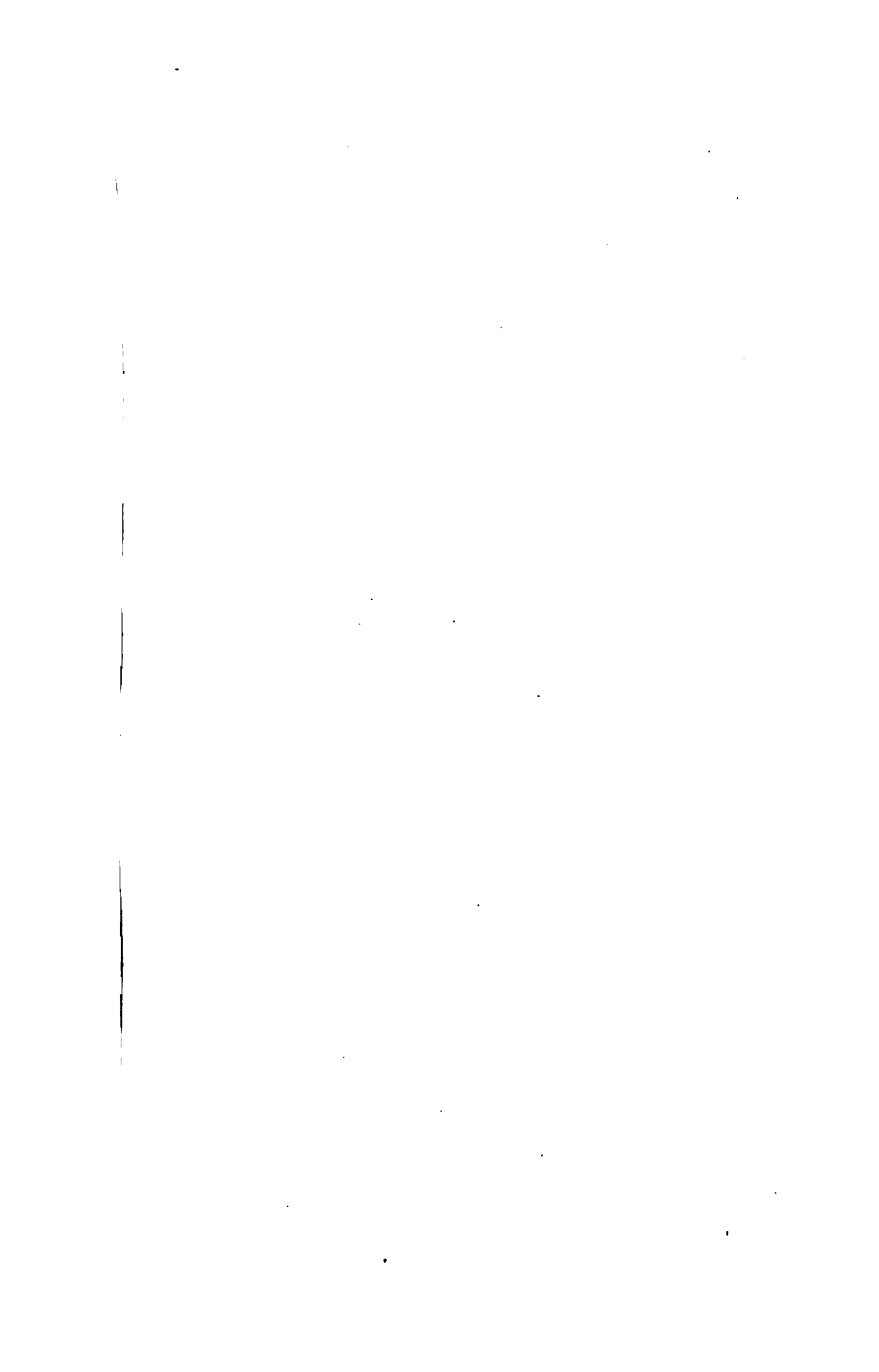
(3) is asked as to the *precise words* of another person's
utterance. — (W. § 779.)

Cross-reference. For a *dying declarant*, see Rule 138 (*post*,
§ 951).

467 ART. 2. *Misleading Questions on Cross-examination.* A
question to an opponent's witness, assuming as true a matter
which he has not yet testified to, or otherwise implying into

¹ On form (3) the rulings are divergent.

² Some Courts deny this, but unsoundly.



his testimony unfavorable matters not yet admitted by him, is not allowable. — (W. § 780.)

Illustrations. To a witness who denies that he made an assault: "What did he say to you before you used your knife?" To a witness who testifies to the words of an alleged slanderous statement: "Are you always so particular in listening to the truth about your friends?"

Distinguish the following rules:

(1) Allowing a cross-examiner to *withhold the ultimate purpose* of his question (Rule 163, Art. 2, *post*, § 1360).

(2) Forbidding a cross-examiner to *assert in argument* a matter not evidenced (Rule 156, Art. 3, *post*, § 1271).

Cross-references. The present principle is applied also in forbidding a cross-examiner to *insinuate misconduct* on cross-examination to character (Rule 106, Art. 2, *post*, § 552).

ART. 3. *Intimidating Questions on Cross-examination.* A 468 question which in manner or substance is calculated improperly to intimidate or disconcert a witness, and thus groundlessly to make testimony appear less trustworthy than it is, is not allowable.¹ — (W. § 781.)

ART. 4. *Repetition of Questions.* The repetition of a 469 question is allowable or not, according to its purpose and the circumstances of the case.² — (W. § 782.)

Par. (a). Repeating an unanswered question upon a matter already ruled to be *inadmissible* is not allowable.

470 *Par. (b).* Repeating a question *once answered* in the same direct or the same cross-examination, or questioning on the same matter in other form, is not allowable.

Cross-reference. For the rule against putting in *on rebuttal* matters belonging to the case in chief, see Rule 164, Art. 4 (*post*, § 1376).

471 *Par. (c).* Repeating on *cross-examination* the questions already put on direct examination, or questioning on precisely the same details, is usually allowable.

472 *Par. (d).* Repeating on cross-examination the same question already properly asked on cross-examination

¹ All Courts concede this. Many trial judges ignore it.

² The trial Court's discretion thus determines (Rule 18, *ante*, § 49).

but *answered unfavorably* or not answered, for the purpose of inducing the witness to change his answer, is usually not allowable.¹

ART. 5. *Length of Examination; Number of Examiners.*

473 (1) The examination of a witness by more than one counsel on the same side during a single stage of testimony is usually not allowable.

(2) The length of time of examination of a witness may if necessary be fixed beforehand. — (W. § 783.)

ART. 6. *Questions by the judge.* The trial judge may put

474 questions,² pursuant to Rule 224 (*post*, § 1990);

(2) and a leading question is allowable. — (W. § 784.)

ART. 7. *Narration without Questions; Non-Responsive*

475 *Answers.* The witness may testify on any specified subject without waiting for questions as to details, unless in a particular instance he appears likely to insert irrelevant matters.

Par. (a). In a *deposition* taken in writing by commission *out of court*, where counsel for the parties do not attend to examine, the testimony must be given on specific interrogatories. — (W. § 785.)

Par. (b). A *response* stating matters *not asked about* in a question is not objectionable if relevant. — (W. § 785.)

Cross-reference. For a *non-responsive* answer as objectionable in a deposition because of lack of notice for *cross-examination*, see Rule 135, Art. 3 (*post*, § 922).

SUB-TOPIC B: NON-VERBAL³ TESTIMONY

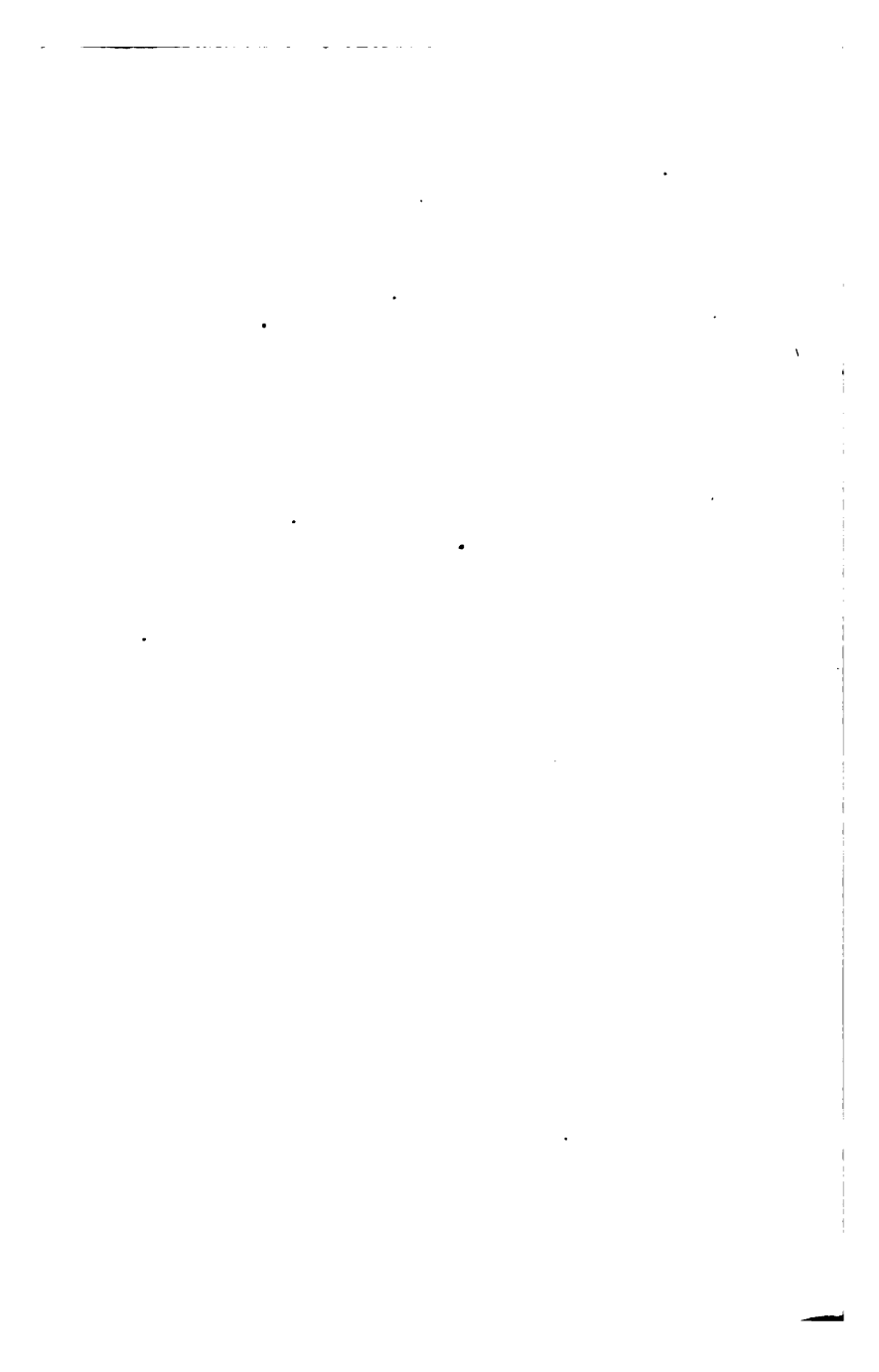
RULE 93. *General Principle.* A witness may communicate

478 his testimony in a form or symbol other than words, wherever

¹ In all these cases, the trial judge may exceptionally rule otherwise, under Rule 18 (*ante*, § 49).

² Here some Supreme Courts place restrictions; but such restrictions are harmful to justice.

³ "Verbal" means "in words made of letters," and is not to be confounded with "oral," meaning "spoken with lips."



in the circumstances it is appropriate;¹
in particular, in the following modes:

ART. 1. *Dramatic Communication.* Testimony may be
479 given or supplemented by gesture, dumb-show, or other
dramatic mode. — (W. § 789.)

Cross-reference. Compare the rule as to *exhibiting in court*
the witness' injured limbs, etc. (Rule 123, *post*, § 730) and the
rule as to *indecent evidence* (Rule 195, *post*, § 1652).

ART. 2. *Pictorial Communication.* Testimony may be
480 given or supplemented by a model, map, diagram, photograph,
or other pictorial or graphic mode; — (W. §§ 790-792.)
subject to the following provisions:

481 *Par. (a).* The map, photograph, etc., must be *verified*,
i. e., must be made a part of the testimony of some witness
qualified by personal observation (pursuant to Rule 86,
Art. 5, *ante*, § 405) of the object represented. — (W.
§§ 793, 794, nn. 1-4.)

482 *Par. (b).* The map, photograph, etc., need *not* be veri-
fied by the *maker* of it; and it need not be by a public
officer. — (W. § 794, nn. 5, 6.)

483 *Par. (c).* Personal observation by the senses is not
necessary when the photograph, etc., is made with some
standard scientific instrument (lens, vacuum-ray, etc.)
capable of disclosing data not perceivable by the unaided
senses and used by a competent operator. — (W. § 795.)

484 *Par. (d).* The *original object* need not be produced
or accounted for, except by virtue of Rule 126 (*post*, § 755)
requiring the production of writings; [but where the origi-
nal of a *writing* is produced under that Rule, a photograph
may also be used, in so far as it may in the circumstances
be useful.]² — (W. §§ 796, 797.)

Distinctions. Distinguish (1) the rule for using *specimens* of
handwriting for comparison (Rule 177, Art. 5, *post*, § 1488).

¹ The rule for trial Court's discretion would here apply
(Rule 18, *ante*, § 49).

² Here the rule for trial Court's discretion should apply
(Rule 18, *ante*, § 52). The rulings are not harmonious.

- (2) the rule excluding *irrelevant* objects shown by photograph (Rules 72, 73, *ante*, §§ 341, 350-354, Rule 73, Art. 2, *post*, § 349).
- (3) the rule as to *showing* objects likely to *excite* prejudice (Rule 123, *post*, § 730).
- (4) the rule for admitting *official maps* and *surveys* as a hearsay exception (Rule 148B, Art. 2, *post*, § 1133).
- (5) the rules of substantive law as to *maps* or *surveys* forming part of a deed by reference.

SUB-TOPIC C: WRITTEN TESTIMONY

RULE 94. *Oral Testimony Required.* All testimonial evidence 488 is communicated to the tribunal by oral utterance of the witness; subject to the following details and exceptions:— (W. § 799.)

ART. 1. *Exceptions.* Wherever the testimonial statement 489 is in writing, made or signed by the witness or adopted by him as his statement, it is regarded as written testimony; and is allowable in the following cases:

Par. (a). Records of past recollection, as admitted under Rule 89 (*ante*, §§ 431-443), and *maps*, diagrams, etc., as admitted under Rule 93 (*ante*, § 480). — (W. § 800.)

Par. (b). Copies, verified by a witness, of an original document not produced, as admitted under Rule 128, Art. 2 (*post*, § 822). — (W. § 801.)

Par. (c). Hearsay writings, as admitted under some exception to the hearsay rule (Rules 137-152, *post*, §§ 950-1198).

Par. (d). An absent witness' testimony, admitted on affidavit or stipulation, to *prevent postponement*, under Rule 231 (*post*, § 2140).

Par. (e). Depositions, being some third person's transcription of testimony orally delivered extra-judicially before an officer and then signed by the witness; as prescribed in Art. 2, below.

ART. 2. *Rules for Depositions.* Whenever the hearsay 490 rule admits a witness' testimony that has been delivered



before trial out of court before a judge or other officer (Rules 135, 136, *post*, §§ 913-945), subject to the procedure prescribed therefor by chancery rule or by code or statute,¹ the mode of such delivery shall be as follows: the counsel to state the questions, if oral, or the officer to read them, if written; the witness to answer them orally; the answers to be written down by the officer or some person appointed by him;² and furthermore: — (W. § 802.)

491 *Par. (a)* the person writing the answers is *not to be* an
agent or kinsman of either of the parties. — (W. § 803.)

492 *Par. (b)* the writing is to be as nearly as feasible a
literal transcription of the answers. — (W. § 804.)

493 *Par. (c)* the answers are to be spontaneously given,
without *improper suggestion*, either by reference to pre-
pared writings or otherwise as forbidden for oral testi-
mony in court (Rules 89, 90, *ante*, §§ 431-451, Rule 92,
ante, §§ 461-475). — (W. § 787.)

494 *Par. (d)* the written answers are to be *read over* to or by
the witness and *signed* by him. — (W. § 805.)

495 *Par. (e)*. The foregoing rules do not apply to a steno-
graphic or other *written report of testimony orally delivered*
at a trial before a jury or a committing magistrate. —
(W. § 805.)

Distinctions. The question whether the written testimony can be *disputed* and shown to be an incorrect report of the oral utterance (Rule 133, Art. 2, *post*, § 902) turns on this distinction between a deposition and a *report of oral testimony*; where Art. 2, par. *a-d*, above, is fulfilled, the writing is the testimony, and is indisputable as to tenor.

Cross-references. Compare the rules as to evidencing testimony by *any one who heard* it (Rule 131, *post*, § 890), or by a hearsay *official report* (Rule 148B, Art. 3, *post*, § 1134), or by using a deposition as a *party's admission* (Rule 119, Art. 5, *post*, § 672).

¹ Here signifying the rules of procedure before trial, which are not covered by the present Code (Rule 5, *ante*, § 11).

² The local statutes of course prescribe the procedure in detail; here merely the general principle is noted, as properly belonging in this Code.

SUB-TOPIC D: INTERPRETED TESTIMONY

RULE 95. *General Principle.* Whenever in the circumstances of the case a witness' natural mode of communication is not adequate to make himself directly intelligible to the tribunal, an interpreter or translator may be used;¹ in particular, when the witness is

- (a) a *deaf-mute*;
- (b) an *alien*;
- (c) unable to speak *aloud*. — (W. § 811).

ART. 1. *Interpreters and Translators.* Whenever an interpreter or translator is used,

- (a) he must be *qualified* in experience, under Rule 83 (*ante*, § 379); — (W. § 811.)
- (b) he must take an *oath* as witness to the words interpreted, under Rule 157 (*post*, § 1285);
- (c) his translation must be in *writing* and annexed, if the testimony is a deposition.

Cross-reference. For the application of the hearsay rule, requiring an interpreter to be called or accounted for, in evidencing *testimony at a former trial*, see Rule 156, Art. 4 (*post*, § 1280).

¹ Here the rule of trial Court's discretion applies (Rule 18, *ante*, 49).



SUB-TITLE II: TESTIMONIAL IMPEACHMENT

TOPIC I: GENERAL RULES

RULE 96. *General Principle of Impeachment.* The process
500 of introducing evidence tending to diminish the trustworthi-
ness of a person whose testimonial statement has been already
admitted as evidence is termed Impeachment. — (W. § 875.)

The rules affecting the various modes of impeachment
involve the following general distinctions, among others:

Par. (a). Some general or *abstract trait* of the witness,
such as bias or moral character, may be offered as evidence;
but this abstract trait may in turn have to be evidenced by
specific instances of conduct. — (W. § 876.)

Par. (b). A fact of the preceding sort may be circum-
stantially *relevant*; but it may nevertheless be excluded
by some principle of *policy* preventing excessive confusion
of issues, undue prejudice, or unfair surprise (Rules 161,
165-6, *post*, §§ 1325, 1383, 1390). — (W. § 877.)

Par. (c). For the purpose of enforcing the foregoing
policy, a rule may forbid the evidencing of a fact by *other*
witnesses, while allowing it by *cross-examination* of the
impeached witness himself. — (W. § 878.)

Par. (d). Some impeaching facts may have a *definite*
relevancy, such as perjury evidencing a disposition to lie;
while others may have an ambiguous, alternative, or
indefinite relevancy, such as an inconsistent statement on
the same point. — (W. § 879.)

RULE 97. *Persons Impeachable.* Any witness may be im-
peached, subject to the following details and exceptions:

ART. 1. *Hearsay Witness.* An extra-judicial testimonial
501 statement, admitted under an exception to the hearsay rule or



otherwise, may be impeached in the appropriate manner as provided under the respective exceptions;
that is to say,

(a) a *dying declarant* (Rule 138, *post*, § 951).

(b) an *attesting will-witness* (Rule 141, *post*, § 1000).

(c) a *declarant* of facts against interest, of facts of family history, etc. (Rules 139, 140, *post*, §§ 966, 980).

(d) an *absent witness*' alleged testimony admitted to avoid a continuance (Rule 231, *post*, § 2140). — (W. §§ 884-888.)

ART. 2. *Defendant as Witness*. A defendant in a criminal case who testifies may be impeached like any other witness, and not otherwise; — (W. § 890.)
that is to say,

Par. (a) his *character* for testimonial traits may be used under Rule 98 (*post*, § 519), but his character as accused under Rule 30 only (*ante*, §§ 130-137);

Par. (b) his *conduct* as evidencing testimonial character may be used under Rule 105 (*post*, §§ 549), but not as evidencing an accused's character except under Rule 43 (*ante*, §§ 218-223);

Par. (c) his *privilege* not to answer is governed by Rule 203 (*post*, § 1730).

ART. 3. *Impeachment of Impeaching Witness*. A witness to impeaching facts may himself be impeached; but in the circumstances the further process may be forbidden, on the principle of preventing excessive confusion of issues (Rule 165, *post*, § 1383).¹ — (W. § 894.)

ART. 4. *Impeaching One's Own Witness*. A party may not introduce evidence impeaching a witness called by himself, [in so far as under the circumstances the party appears to

¹ Rulings differ; this limitation would probably be accepted.



have committed a fraud upon the Court or to desire chiefly to punish or coerce the witness];¹ — (W. §§ 896-899.)
subject to the following provisions:

505 *Par. (a).* He may not show bad testimonial character.
— (W. § 900.)

506 *Par. (b).* He may not show *bias, interest, or corruption.*
— (W. § 901.)

507 *Par. (c).* He may [not] show a prior *self-contradictory statement*; [except [by a cross-examination] where the witness' prior statements have led the party to expect contrary testimony,][and for the sole purpose of stimulating the witness to recollect and to revise his testimony].² — (W. §§ 902-905.)

Cross-reference. Compare the general rules for impeachment by self-contradiction (Rule 108, *post*, § 574).

508 *Par. (d).* He may show all facts relevant to his case, even though the witness is thereby *contradicted* by other witnesses, [and may discredit the witness thereby on other matters].³ — (W. § 908.)

509 ART. 5. *Who is One's Own Witness.* The foregoing rule forbids the impeachment as follows:

Par. (a). It is forbidden to the party first calling a witness, after any relevant answer has been made to a question, pursuant to Rule 164 (*post*, § 1376). — (W. § 910.)

510 [*Par. (b).* It is forbidden to the party first calling a witness on matters testified to when afterwards called by the opponent;

¹ The last clause is not law anywhere, but it is the only justifiable scope of this rule. The ensuing §§ 505-515 would therefore be dispensed with, under that clause.

² There are several forms of rule, varying between unconditional admission and exclusion. The form with the clauses in brackets has perhaps most adherents; but it is less desirable. Statutes exist in some States.

³ Not all Courts concede the clause in brackets.

except where the opponent has used a deposition taken but not used by the first party.¹ — (W. § 913.)

511 *Par. (c).* It is [not] forbidden to the opponent who afterwards calls a witness already called by the first party; *except* where a deposition, used by the opponent, was taken but not used by the first party.² — (W. §§ 911, 912.)

Cross-references. Compare the rule that *either party* may use a deposition taken and not used by the other (Rule 135, *post*, § 919); the rule as to putting in one's *own case on cross-examination* (Rule 164, *post*, § 1376); and the rule as to compulsory putting in of the *whole of a deposition* (Rule 184, *post*, § 1561).

512 [*Par. (d).* It is forbidden to a party who on *cross-examination* has obtained facts pertaining to his *own case* in chief — (W. § 914); and this includes a prohibition of leading questions.]³ — (W. § 415.)

Cross-reference. For the only just rule as to leading questions, see Rule 92 (*ante*, § 462).

513 *Par. (e).* It is [not] forbidden to a party who calls the *opposing party*.⁴ — (W. § 916.)

514 *Par. (f).* It is not forbidden to a party
(1) whose *co-party* in a *criminal case* testifies for himself or for the prosecution,
(2) or whose *co-party* in a *civil case* testifies for himself or for the opponent. — (W. § 916.)

515 *Par. (g).* It is not forbidden to a party calling a witness specifically required by law to be called by him, under Rules 130, 131, (*post*, §§ 841, 890), in particular an attesting will-witness. — (W. §§ 917, 918.)

¹ The rulings are not agreed.

² The rulings are not agreed.

³ This senseless rule obtains in some jurisdictions.

⁴ Many Courts hold *contra*. Statutes often regulate it.

TOPIC II:

CHARACTER, MENTAL DEFECTIVENESS, BIAS, ETC.,
AS GENERAL TRAITS IN IMPEACHMENT

RULE 98. *Moral Character.* The defective moral character
518 of a witness, in so far as it involves a diminution of his truth-
fulness, is relevant in impeachment. — (W. §§ 920-922.)

Cross-reference. For *reputation* as a mode of evidencing to
such character, see Rule 147 (*post*, § 1071).

For instances of *conduct*, as evidencing such character, see
Rule 105 (*post*, § 549).

ART. 1. *Kind of Character.* The specific trait of veracity is
519 admissible; [and also the general character] [[in so far as in
the circumstances a knowledge of it may seem useful]].¹ —
(W. § 923.)

Cross-reference. For the *form* of the question ("Would you
believe him on oath," etc.), see Rule 176 (*post*, § 1471).

Distinguish the use of an *accused's* character as witness and
as party (Rule 97, Art. 2, *ante*, § 502). — (W. § 925.)

Par. (a). No other specific trait than *veracity* is
520 admissible.² — (W. § 924.)

ART. 2. *Time of Character.* The time of the character may
521 be any time not unreasonably remote;³

except so far as a reputation at a time after controversy
begun may be excluded as a mode of evidence by Rule 147
(*post*, § 1071). — (W. §§ 927, 928.)

¹ A large minority of Courts admit general character; for
that form of rule, the last clause, though not law, seems
wise; the trial Court should have discretion.

² A few Courts admit other traits; but this is unsound.

³ A few Courts exclude prior character; some others exclude
it unless no other is available.



ART. 3. *Place of Character.* The place of the character
522 may be any place;

except so far as a reputation elsewhere than in the place of
residence may be excluded as a mode of evidence by Rule
147 (*post*, § 1071). — (W. § 929.)

RULE 99. *Insanity, Intoxication, and Sundry Mental Defects.*
523 The defective mental capacity or condition of a witness,
at a time when
and in such degree as

it involves a diminution of his trustworthiness in respect to
any one of the three testimonial elements, Observation,
Recollection, or Communication (Rule 80, *ante*, § 367), is
relevant in impeachment; — (W. § 931.)

subject to the following provisions:

ART. 1. *Insanity.* Any form of insanity is admissible.¹ —
524 (W. § 932.)

ART. 2. *Intoxication* is admissible [and, in the circumstances
525 of the case, a habit of intemperance in-liquor].² — (W. § 933.)

ART. 3. *Disease, etc.* Any disease, drug-habit, or the like,
526 is admissible.³ — (W. § 934.)

[[ART. 4. *Degrees of Mental Accuracy.* A marked variation
527 from the normal mental accuracy in observing or remembering
is admissible, where a particular issue depends specially
upon testimonial precision in such matters; and for this
purpose a witness' powers may be tested by psychological
experts with any standard method recognized as trust-
worthy.]]⁴

¹ Possibly not all Courts would go so far.

² The bracketed clause would not be law in most States.

³ The rulings here are scanty, and less liberal.

⁴ This is not yet the law anywhere; but should be provided
for, in case applied psychology develops any such trustworthy
method. No doubt, even now, simple and telling experiments
would to-day be permitted, to show the general fallibility of
observation and memory; as noted under Rule 106, below.



ART. 5. *Theological Belief; Race.* Theological belief, or 528 race, or alienage, is not admissible. — (W. §§ 935, 936.)

RULE 100. *Inexpertness, Bias, Interest.* The following 529 qualities are admissible in impeachment:

Par. (a). A deficiency in *expertness*, so far as the topic is one of which special expertness is required. — (W. § 940.)

Cross-reference. Compare the rule as to one expert's *opinion* of another's qualifications (Rule 176, Art. 2, *post*, § 1470), and as to evidencing *inexpertness* by *particular instances of error* (Rule 106, *post*, §§ 558-564).

Par. (b). A *partisan feeling* against or in favor of one of the parties or issues in the cause. — (W. § 940.)

Cross-reference. Compare the *opinion* rule as applied to bias (Rule 174, *post*, § 1458).

Modes of evidencing this bias are dealt with in Rule 102 (*post*, § 535).

Par. (c). A *mercenary inclination* to distort the testimony to favor one party or the other.

This inclination is of two sorts, according, as it is

(1) inferred to exist from the witness' *conduct* before trial, in accepting profit or a pledge thereof, for his testimony (*Corruption*), — dealt with in Rule 103 (*post*, § 540);

(2) or, inferred to exist from the *circumstance* that the witness will receive profit or loss according to the decision of the cause (*Interest*), — dealt with in Rule 104 (*post*, § 546).



TOPIC III:

EVIDENCING GENERAL QUALITIES BY CONDUCT AND CIRCUMSTANCES

RULE 101. *Extrinsic Testimony and Cross-Examination.*

532 The evidencing of any of the foregoing general qualities by specific instances of conduct or by specific circumstances may be made

(a) either by calling other witnesses,

(b) or by cross-examination of the witness himself;

unless some express limitation is herein made. — (W.

§ 943.)

ART. 1. *Scope of Cross-Examination.* A liberal scope

533 may be allowed by the trial judge wherever the discrediting conduct or circumstances are sought to be evidenced by cross-examination.¹ — (W. § 944.)

Cross-reference. Compare the rule for *not disclosing* the relevancy of a question on cross-examination (Rule 163, *post*, § 1360).

ART. 2. *Demeanor on the Stand.* The demeanor of the

534 witness while testifying may furnish evidence as to his testimonial qualities. — (W. § 946.)

Cross-reference. Compare the rule for demeanor of the *accused* (Rule 650, *post*, § 118).

535 RULE 102. *Bias.* A witness' bias may be evidenced

(a) by *circumstances* likely to produce it;

or, (b) by *conduct* exhibiting it. — (W. § 948.)

¹ This rule ought therefore to leave everything to the trial Court's discretion, pursuant to Rule 18 (*ante*, § 48).

ART. 1. *Circumstances indicating Bias.* Circumstances
536 bringing the witness into a status to one of the parties, as
family-member or relative, employee, opponent in other
litigation, or otherwise, so as to make likely in human experi-
ence a feeling of special sympathy or hostility, are admissible.¹
— (W. § 949.)

Cross-reference. The *procuring* of an indictment may also
be admissible as conduct showing hostility (Art. 2, *infra*);
the *pendency* of an indictment may also be evidence of in-
terest (Rule 104, *post*, § 547).

ART. 2. *Conduct and Utterance.* Any conduct or utterance
537 indicating a special sympathy or hostility is admissible.¹ —
(W. § 950.)

538 *Par. (a).* The *details of a quarrel*, as evidencing the
depth or the insignificance of the feeling, whether on
cross-examination or on re-direct examination, may be
excluded, if the principle of preventing excessive confusion
of issues or undue prejudice (Rules 165, 166, *post*, §§ 1383,
1390) so requires.² — (W. §§ 951, 952.)

539 *Par. (b).* The rules for *prior inquiry* whether the witness
made a statement attributed to him (Rule 108, *post*,
§ 579) here [do not] apply.³ — (W. § 953.)

RULE 103. *Corruption.* A corrupt inclination to make the
540 testimony favor one party or the other may be evidenced by
conduct, as follows:

ART. 1. *Willingness to lie.* A witness'
541 expression of a willingness to lie in general,
or to lie in the cause in hand,
or a confession of having lied in the cause in hand,
is admissible. — (W. §§ 957-959.)

¹ The rule of trial Court's discretion ought here to control
(Rule 18, *ante*, § 49).

² The rule of trial Court's discretion should here apply
(Rule 18, *ante*, § 49).

³ Courts differ on this point. The better doctrine would be
the affirmative, if the rule were not applied as technically as
it to-day is.



ART. 2. *Subornation*. A witness' act
 542 of giving pecuniary profit to another person,
 or of receiving it himself,
 for falsely giving or for suppressing evidence, is admissible.
 — (W. §§ 960, 961.)

Cross-reference. Compare the rule for a *party* (Rule 654,
post, § 118).

543 *Par. (a)*. A witness' receipt of pecuniary profit, past
 or promised, for his testimony, whether as fees, expenses,
 or otherwise, is admissible; though in the circumstances
 the inference may be of Interest only (Rule 104, *infra*)
 and not of Corruption. — (W. § 961.)

ART. 3. *Sundry Corruption*. The habitual making or
 544 aiding of false claims of the kind in issue is [not] admissible.¹
 — (W. § 963.)

ART. 4. *Prior Inquiry*. The rules for prior inquiry whether
 545 the witness made a statement attributed to him (Rule 108,
post, § 579) here [do not] apply. — (W. § 964.)

RULE 104. *Interest*. An inclination to distort the testimony
 546 to favor one party or the other may be evidenced by an ex-
 pected pecuniary profit or loss depending on the event of the
 cause;
 in particular, by the circumstance

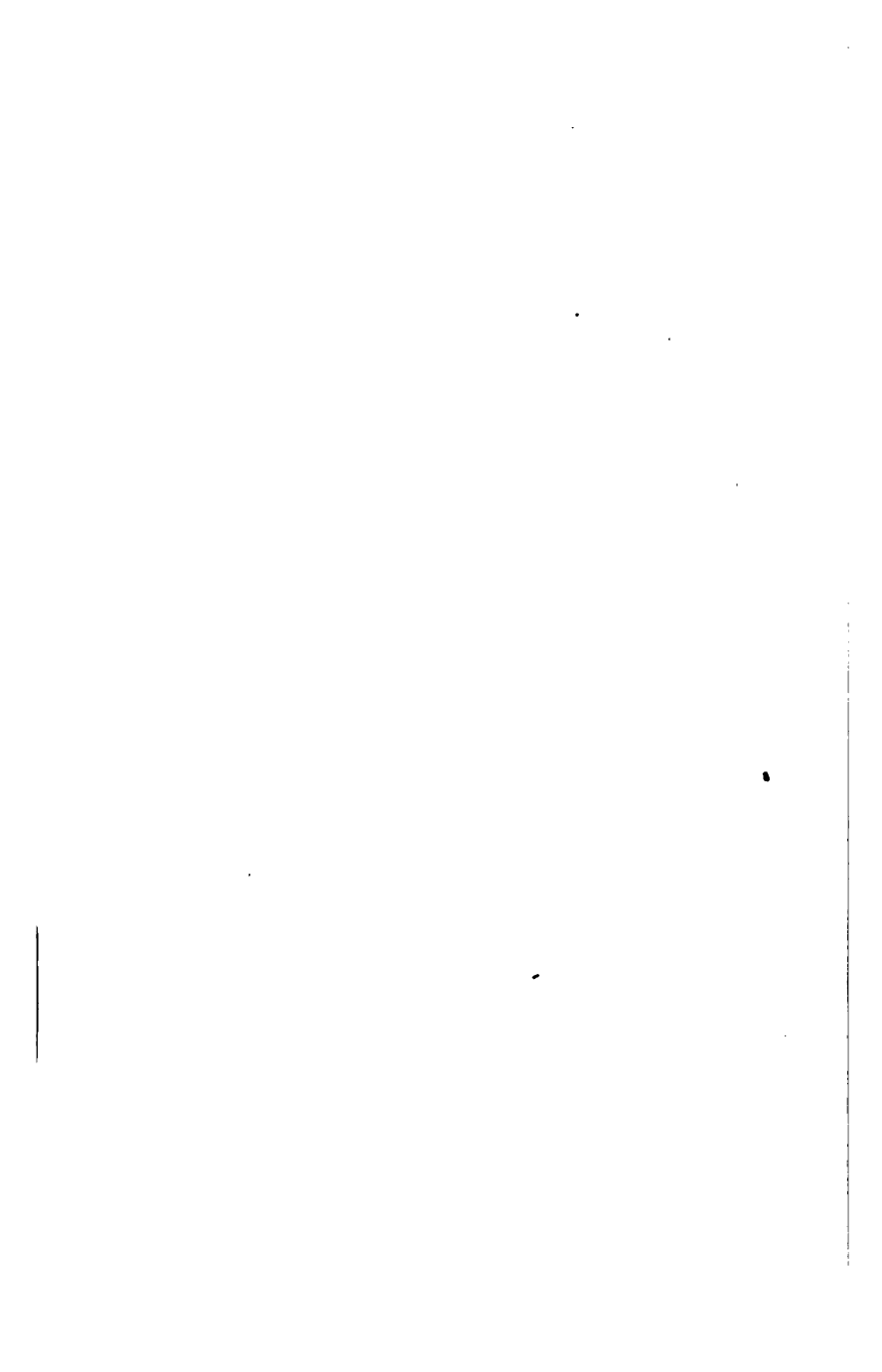
Par. (a) that the witness, as a *party* or otherwise, will
 be pecuniarily and directly affected by the decision of the
 cause, whether civil or criminal.² — (W. §§ 966, 968.)

547 *Par. (b)* that the witness is an *accomplice* or co-indictee.
 — (W. § 967.)

548 *Par. (c)* that the witness, as surety, police-officer,
 injured person, or otherwise, may be *indirectly* affected

¹ Some Courts erroneously insert the "not."

² Here there is a question whether the judge may in a
 criminal case specifically mention the accused's interest in
 his charge to the jury. For civil cases there are numerous
 statutes.



in repute, in testimonial credit, or in pecuniary profit, by the decision of the cause. — (W. § 969.)

RULE 105. *Moral Character.* The testimonial moral character of a witness, as relevant under Rule 98 (*ante*, §§ 518-522), may be evidenced by specific instances of misconduct, subject to the following limitations based on the principles of preventing excessive confusion of issues, undue prejudice and unfair surprise (Rules 161, 165-6, *post*, §§ 1325, 1383, 1390):

ART. 1. *Extrinsic Testimony.* The misconduct may not be evidenced by the testimony of other witnesses. — (W. §§ 979 987.)

Par. (a). Except that a *conviction for crime* may be so evidenced (W. §§ 980, 987), if relevant under Art. 2, par. (c), *infra*.

Cross-reference. For the rule requiring the *copy of the record* of judgment, see Rule 128 (*post*, § 826).

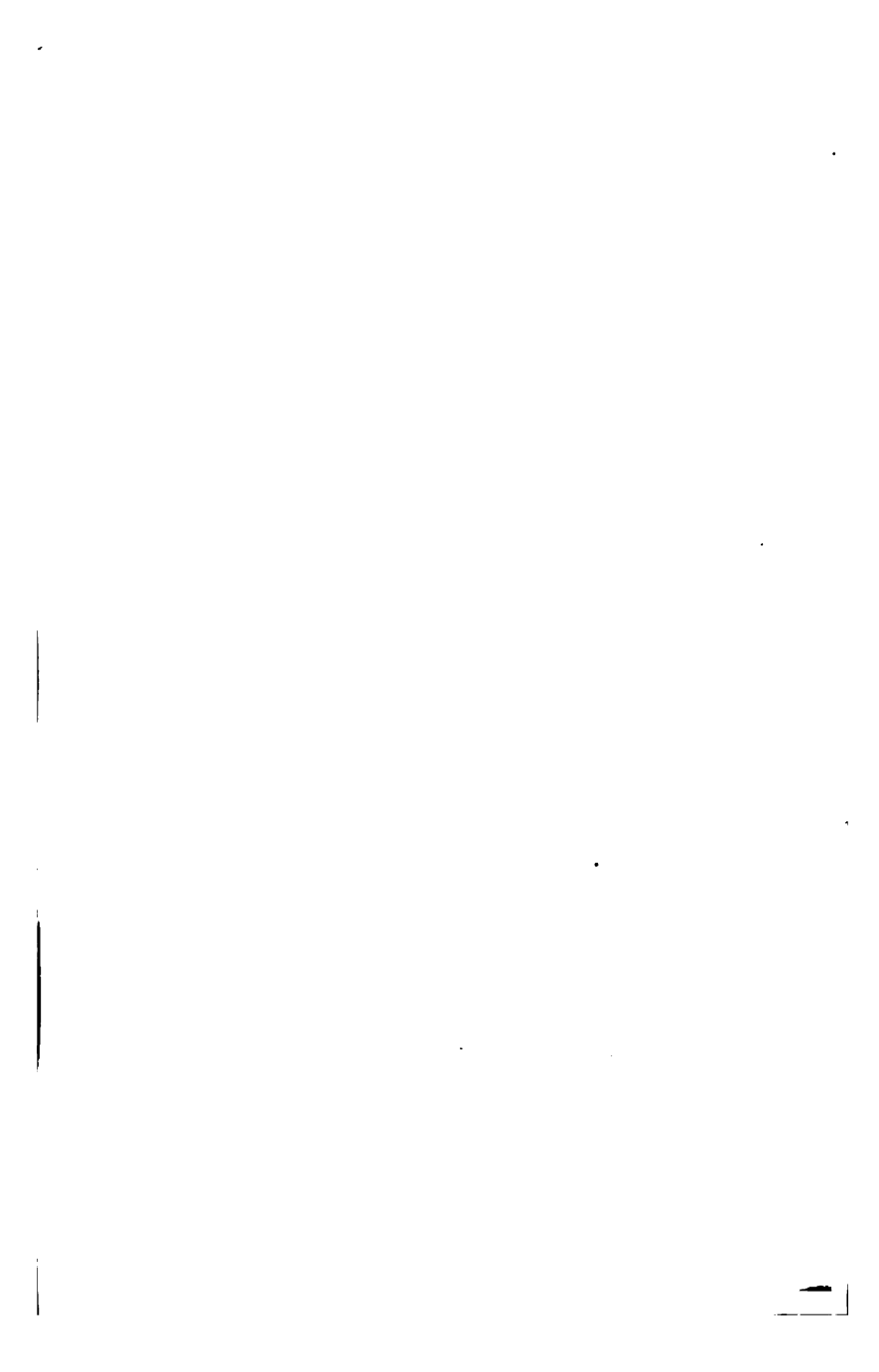
ART. 2. *Cross-examination.* On cross-examination of the witness himself, his misconduct may be evidenced (W. §§ 981, 987);
provided that

[Par. (a) the misconduct must be *relevant* to the specific trait (Rule 98, *ante*, § 519) of lack of veracity; unless in so far as a knowledge of other traits of his character may in the circumstances be useful in estimating his trustworthiness.]¹ — (W. §§ 982, 987.)

[Par. (b) in all cases the *trial Court* may limit the scope of the facts cross-examined, in order to protect the witness from exposures which seem to be sought maliciously or to be unprofitable for showing the witness' untrustworthiness.]² — (W. §§ 983, 987.)

¹ Few Courts lay down such a rule; most ignore any relevancy to the veracity-trait.

² Almost all Courts rule thus. A few follow the English rule of setting no limit. A few adopt the opposite extreme of forbidding all cross-examination to misconduct.



Distinguish (1) the *privilege* of the witness, even where the fact is properly asked for on cross-examination, not to make answer involving *crime* (Rule 202, *post*, § 1730) or *disgrace* (Rule 201, *post*, § 1701); — (W. § 984.)

(2) the prohibition of questions *insinuating* misconduct, but not *bona fide* expecting an affirmative answer (Rule 92, *ante*, § 467, and Rule 156, *post*, § 1271).

555 *Par. (c)* where a *conviction of crime* is used, the crime must be one involving [dishonesty.]¹ — (W. §§ 980, 987.)

556 *Par. (d)* an *arrest*, or complaint, [being only an accusation, and therefore hearsay,] is [not] admissible.² — (W. §§ 982, 987.)

Illustrations. On a prosecution for keeping a gambling-house, a police officer is witness for the prosecution; his cross-examination asks (1) whether he has ever been divorced for adultery, (2) whether he has ever himself kept a gambling-house, (3) whether he has ever made a false charge against the defendant and withdrawn it for money; (4) a conviction for assault is then introduced by copy of the record. Of these, (1) may well be excluded under *Par. (b)*; (2) might be excluded under *Par. (a)* or *Par. (b)*, but probably would not be; (3) would always be admitted; (4) would depend entirely on the local statute, but on principle should be excluded under *Par. (a)*.

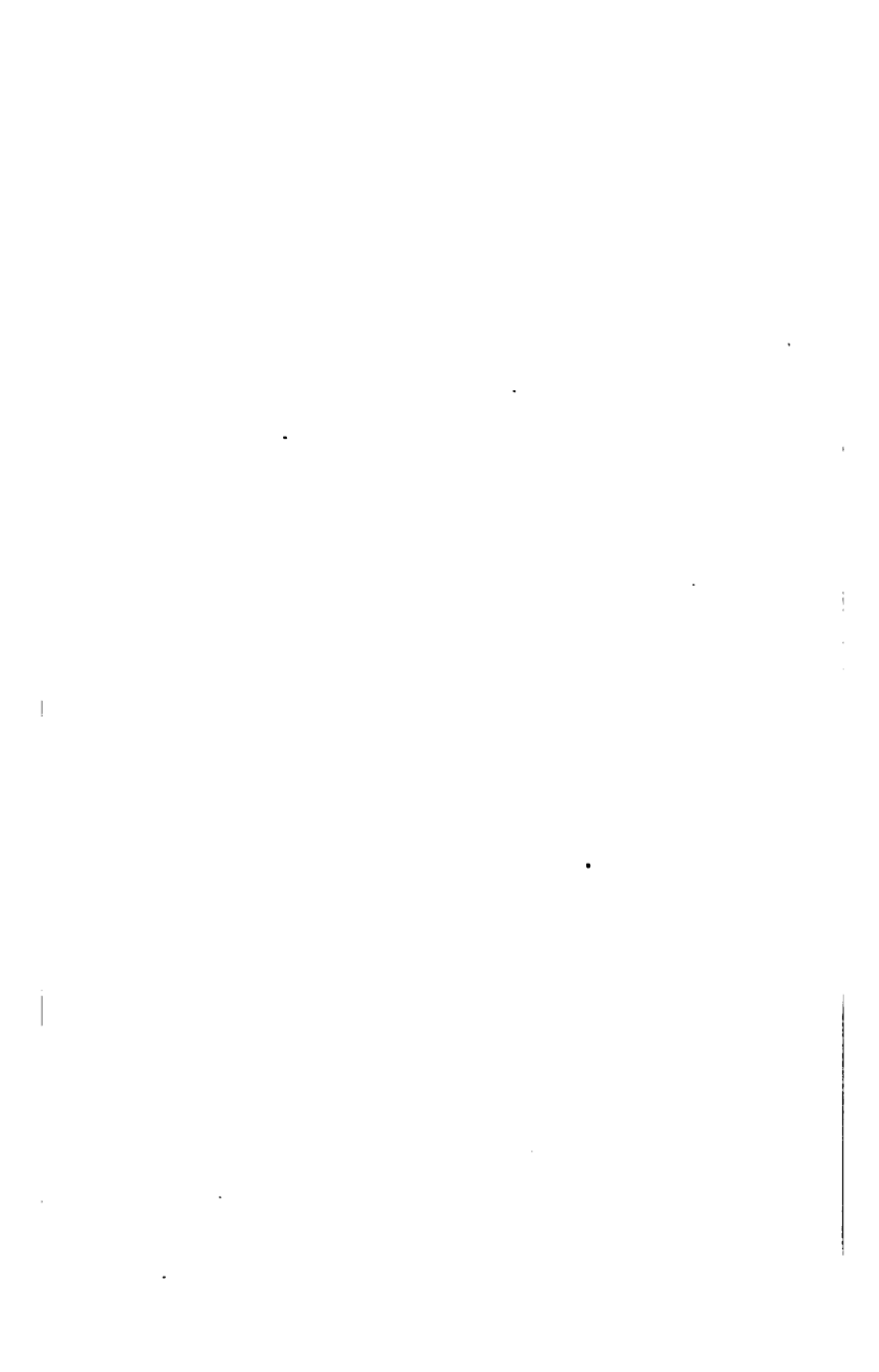
557 ART. 3. *Rumors of Misconduct, to test a Reputation-Witness.* The rule of Art. 1, *supra*, does not forbid questioning a witness to good reputation of an accused or of another witness as to having heard rumors of the misconduct of the person to whose good repute he testifies; [[provided the counsel in good faith believes that there were such rumors.]]³ — (W. § 988.)

558 RULE 106. *Skill, Observation, Memory, etc.* The quality or degree of a witness' special Experience (Rule 83, *ante*, § 379), and his capacity or means of Observation (Rule 86, *ante*,

¹ No Court uses precisely this rule. Statutes obtain almost everywhere; by some, any crime suffices; by others, only a felony; by others, any crime that would have disqualified at common law.

² Courts differ on this point.

³ Almost all Courts accept this rule; but the bracketed clause should be enforced to prevent abuse.



§ 400), of Recollection (Rule 88, *ante*, § 427), and Communication (Rule 91, *ante*, § 454) may be evidenced by specific instances exhibiting the witness' deficiencies, subject to the following provisions:

ART. 1. *Extrinsic Testimony.* Testimony of other witnesses to specific facts occurring out of court is not allowed (W. §§ 991-996);

except as follows:

559 [Par. (a) To circumstances affecting the witness' *actual means* of observation or of recollection;]¹

Illustration. Testimony that at the time and place of an accident the moon was not shining, or the view was obstructed by an embankment.

Distinguish the rule as to *contradiction* on a collateral point, which ought not to be here applied (Rule 107, *post*, § 570).

560 [Par. (b) To specific instances of defective *capacity* as to experience, observation, or memory, if the issue makes such capacity specially important, provided no excessive confusion of issues or unfair surprise is involved]²

[[or provided the extrinsic testimony is that of a psychological expert under Rule 99, Art. 4 (*ante*, § 527)]. — (W. § 991.)

Illustrations. (1) An expert to handwriting identifies a certain signature as forged. The opponent may show that the same witness, when shown several other notes before trial, identified them erroneously.

(2) A wagon-driver testifies to having seen a red light at a place of street-repairs. The neighbouring druggist may testify that the driver has formerly mistaken a green light in the store-window for a red light.

ART. 2. *Cross-examination, and Tests in Court.* Specific circumstances and instances may be evidenced,

561 Par. (a). On cross-examination, by questions as to *circumstances* affecting the witness' *means of experience*, of *observation*, and of *memory*.³ — (W. §§ 994, 995.)

¹ Most Courts would allow this.

² Few Courts would allow this. The clause in double brackets is a provision for the law of the future.

³ This is universally allowed.



Illustrations. Asking whether a medical man ever attended a similar case before; whether the moon was shining on the night of an affray; why the witness remembers the exact date; etc., etc.

562 [Par. (b) On cross-examination, by questions as to *specific prior instances, out of court, exhibiting defective capacity* as to experience, observation, memory, or narration.]¹ — (W. §§ 991-996.)

Illustrations. Asking whether a medical man did not once cause death by erroneous diagnosis; whether a bookkeeper did not once make a mistake of \$50,000 in his balance; etc.

563 Par. (c) On cross-examination, by questions to elicit *specific present instances* of such *defective capacity*.² — (W. §§ 991-996.)

Illustrations. (1) *Expertness.* Asking a medical witness to define certain terms in his science; asking an illiterate witness, who has testified to a precise time, to tell the time now by the clock.

(2) *Observation.* Asking a witness to colors to pick out red or brown in the room.

(3) *Memory.* Asking a witness to give other details relating to an occurrence which he claims to remember well, or details of other occurrences not related.

564 [Par. (d) On cross-examination, with the aid of counsel or other persons, by simple *artificial tests, performed in court*, exhibiting specific present instances of such capacity.]³ — (W. §§ 991-996.)

Illustrations. (1) Testing a witness to the identity of patents, by bringing another machine and having another expert question him as to its construction.

(2) Testing a stenographic witness to a conversation by having him write a short report and then translate it.

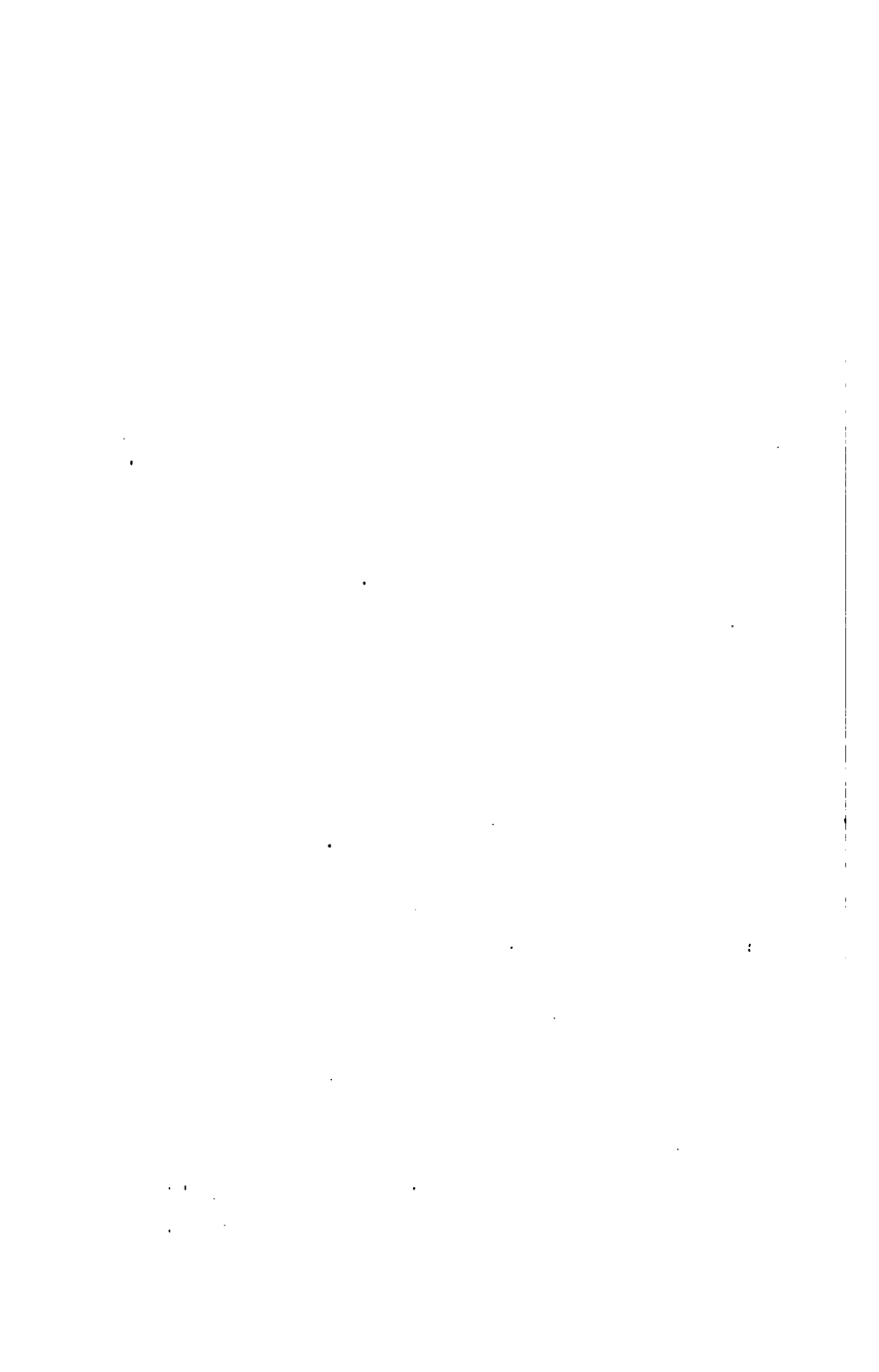
565 [[Par. (e) Without cross-examination, but in court, by tests made upon the witness by a *psychological expert*, where the issue is one in which precision of observation or memory is important]].⁴

¹ This would be allowed by some Courts.

² This is universally allowed.

³ This is sometimes allowed.

⁴ This provides for the law of the future, pursuant to Rule 99, Art. 4 (*ante*, § 527).



ART. 3. *Collateral Contradiction.* So far as any evidence
566 may be allowable under Arts. 1 or 2 above, it is not forbidden
by the rule (Rule 107, *post*, § 567) against contradiction on a
collateral matter.¹

TOPIC IV: CONTRADICTION AND SELF-CONTRADICTION

RULE 107. *Contradiction (Specific Error).* The degree or
567 quality of a witness' trustworthiness may be evidenced in-
definitely (Rule 96, par. (d), *ante*, § 500) *i. e.* without relevancy
to any particular testimonial trait or element, such as moral
veracity, memory, etc., by errors of assertion made by him
in specific facts;

provided that on collateral facts the error cannot be evi-
denced by calling other witnesses in contradiction, in pur-
suance to the principle (Rules 161, 165, *post*, §§ 1325, 1383)
preventing excessive confusion of issues and unfair surprise;
— (W. §§ 1000-1002);

subject to the following details:

ART. 1. *Collateral Facts defined.* A fact is not collateral
568 which could have been independently evidenced for some
other purpose than that of proving the error by contradiction;
— (W. § 1003);
this includes

569 *Par. (a).* A fact otherwise *admissible under the issues* in
the case. — (W. § 1004.)

570 *Par. (b).* A fact otherwise *admissible to impeach the*
witness under Rules 96-106 (*ante*, §§ 500-565).²
(W. § 1005.)

Illustrations. Whether the witness had a prior lawsuit with
the plaintiff; whether the moon was shining at the time of the
affray; whether an expert witness is a graduate of a medical
school.

¹ This is needed, to guard against the occasional misuse of
Rule 107.

² Some Courts are here too strict. The whole matter is
governed by the rule of discretion (Rule 18, *ante*, § 49).



ART. 2. *Direct and Cross-examination.*

571 *Par. (a).* A collateral fact asserted on *direct examination* is not thereby exempted from the rule. — (W. § 1007.)

572 *Par. (b).* The rule does not prevent *questioning* as to collateral facts on *cross-examination* to discover specific errors, but only forbids the proof of the error by calling other witnesses.¹ — (W. § 1006.)

573 [ART. 2. *Falsus in uno.* If the witness consciously falsifies upon a material fact, the jury may reject his entire testimony, except so far as they may believe it because of corroboration by other evidence]; [[but they are in no case obliged to believe it]].² — (W. §§ 1008-1015.)

574 RULE 108. *Self-Contradiction.* The degree or quality of a witness' trustworthiness may also be evidenced indefinitely (Rule 96, par. (d), *ante*, § 500) by the inconsistency of assertions made by him on specific facts;

provided that on collateral facts the inconsistency cannot be evidenced by calling other witnesses to testify to his self-contradictory assertion, pursuant to the principle (Rules 161, 165, *post*, §§ 1325, 1383) of preventing excessive confusion of issues and unfair surprise; (W. §§ 1017-1019.)

subject to the following details:

575 ART. 1. *Collateral Facts defined.* A fact is not collateral which could have been independently evidenced for some other purpose than that of proving the self-contradiction; — (W. §§ 1018, 1020.)

this includes

576 *Par. (a).* A fact otherwise admissible under the issues in the case. — (W. § 1021.)

¹ Some Courts do not accept this, nominally at least.

² This rule is generally laid down, though in varying phrases; but it is wholly unsound, for several reasons. The proposed clause in double brackets guards against its worst defect.

577 *Par. (b).* A fact otherwise admissible to impeach the witness under Rules 96-106 (*ante*, §§ 500-565). — (W. § 1022.)¹

Illustrations. See Rule 107 (*ante*, § 568).

578 ART. 2. *Cross-examination.*

Par. (a). The rule does not prevent *questioning* as to collateral facts *on cross-examination* to elicit self-contradictions, but only forbids the proof by calling other witnesses.¹ — (W. § 1023.)

Par. (b). The rule prevents proof of an assertion which is inconsistent only with the witness' answer to the preliminary question required by Art. 3 *infra* on cross-examination. — (W. § 1038.)

579 ART. 3. *Preliminary Warning.* Before calling other witnesses to evidence the self-contradictory statement, the cross-examining counsel must, on the principle of preventing unfair surprise (Rule 161, *post*, § 1326), ask the witness whether he made the supposed inconsistent statement; — (W. §§ 1025-1028)

Cross-reference. Compare the application of this rule to *bias-ulterances* (Rule 102, Art. 2, *ante*, § 539) and to *parties' admissions* (Rule 116, *post*, § 633).

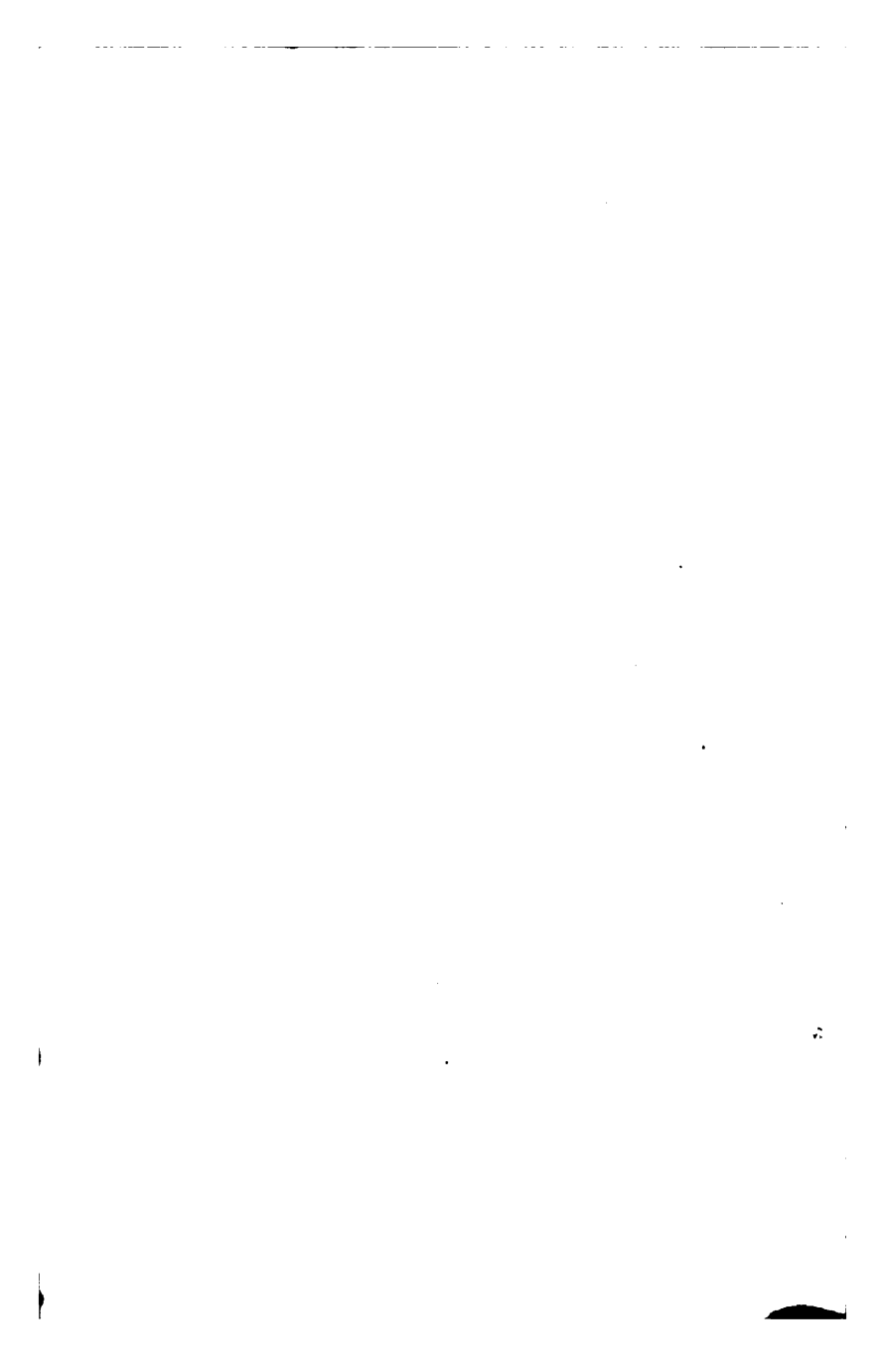
subject to the following details:

580 *Par. (a).* The question may be asked on cross-examination; but if not then asked, the witness may be *recalled* for *re-cross-examination* to put the question. — (W. § 1036.)

581 *Par. (b).* The question must be *specific* enough, as to the time, place, and other circumstances of the supposed inconsistent statement, so that the witness may be enabled to identify it if made.² — (W. § 1029.)

¹ A few Courts state the contrary.

² Most Courts enforce the rule in this form, but too technically. It is plainly covered by the rule for trial Court's discretion (Rule 18, *ante*, § 49).



582 *Par. (c).* The question may be dispensed with [[where the absence or decease of the witness, or other circumstances, make it impracticable;¹ in particular,]] where the testimony containing the statement to be self-contradicted is in the form of

[(1) a *deposition.*]² — (W. § 1031.)

[(2) testimony at a *former trial.*]³ — (W. § 1032.)

[(3) *hearsay utterances* of a dying declarant, attesting witness, or the like.]⁴ — (W. § 1033.)

[(4) testimony of an *absent person admitted* under Rule 231 (*post*, § 2140), to avoid a postponement, provided its truth has not been conceded.]⁵ — (W. § 1034.)

583 *Par. (d).* The question is equally required where the supposed *self-contradictory statement* is contained in a *deposition* or other sworn statement. — (W. § 1035.)

584 *Par. (e).* Where the supposed self-contradictory statement was made *in writing*, the method of putting it is governed by Rule 127 (*post*, § 812).

585 *Par. (f).* The self-contradictory statement is admissible even though the witness

(1) fails to deny making it,⁶ — (W. § 1037, nn. 1, 2.)
[or, (2) admits making it.]⁷ — (W. § 1037, n. 3.)

586 ART. 4. *Self-Contradiction defined.* A statement admissible as a self-contradictory assertion may be in any form of utterance or conduct expressly or impliedly exhibiting a belief inconsistent with the assertion in the present testimony;⁷ — (W. § 1040)
in particular:

¹ No Court lays down this broad rule.

² The authorities are divided; most are *contra*.

³ Most Courts agree on this.

⁴ Most Courts are *contra*.

⁵ All Courts now agree to this.

⁶ Many Courts deny this.

⁷ Some Courts would not phrase it so broadly.

Cross-reference. For *conduct*, compare *admissions by conduct* (Rule 118, *post*, § 641).

587 *Par. (a)* It may [not] be an *opinion*.¹ — (W. § 1041.)

Illustration. An eye-witness who testifies to facts exonerating the defendant may be impeached by an opinion expressed that the defendant was guilty.

588 *Par. (b)* It may be a *silence* when a positive assertion would have been natural. — (W. § 1042.)

Illustration. A witness testifying to the presence of an accomplice at a murder may be impeached by his failure, when testifying at the committal, to mention anything about an accomplice.

ART. 5. *Self-Contradictory Statement not Testimony.* The statement offered as inconsistent is admissible only for the purpose of discrediting the witness' testimony as given on the stand; therefore,

589 *Par. (a)* It is not of *itself testimony*.² — (W. § 1018, n. 2.)

590 *Par. (b)* It may be excluded, where a prior positive assertion, offered to contradict the witness' negative assertion or *failure to recollect* on the stand, is in danger of being misused by the jury.³ — (W. § 1043.)

591 ART. 6. *Explaining the Inconsistency.* The witness is allowed and entitled on re-examination to explain away the inconsistency of the statement; (W. § 1044.)
and for this purpose

[*Par. (a)* he may make the explanation on *cross-examination* at the time of being questioned under Art. 3 above];⁴

Par. (b) he may testify to such other parts of the statement as explain its significance, subject to Rule 185 (*post*, § 1576). — (W. § 1045.)

¹ Most Courts have the unsound notion that the opinion rule applies some limit here.

² This is a truism, usually forming a quibble in instructions.

³ This rule is usually too strictly enforced.

⁴ This is probably not the law; but the cross-examiner should not be allowed to choke off the explanation.

SUB-TITLE III:

TESTIMONIAL REHABILITATION

(SUPPORTING OR RESTORING A WITNESS' CREDIT)

RULE 109. *General Principle.* When evidence to diminish
595 a witness' personal credit in any of the foregoing ways has
been received, evidence relevant to restore the witness'
credit, by denying the discrediting fact or by explaining
away its significance, may be introduced; subject to the
following detailed rules. — (W. §§ 1100, 1101.)

Distinguish the general process of *rebutting* the opponents'
evidential facts relevant to the case; there the rules as to *order*
of evidence are involved (Rules 163-4, *post*, §§ 1352, 1377).

TOPIC I:

REHABILITATION AFTER IMPEACHMENT

RULE 110. *Introducing Good Moral Character.* A witness'
596 good moral character for veracity [or for morality in general]¹
may be introduced after his moral character has been im-
peached; but not before; — (W. § 1104)
that is to say, after evidence

597 *Par. (a) of his abstract moral character for veracity* [or
character in general];¹ — (W. § 1105.)

598 [*Par. (b) of particular instances of misconduct, admitted*
on cross-examination or evidenced by conviction of crime,
under Rule 101 (*ante*, §§ 532-534);]² — (W. § 1106.)

599 *Par. (c) of corruption, under Rule 103 (ante, §§ 540-*
545); — (W. § 1107.)

¹ The bracketed clause applies in Courts permitting im-
peachment by general bad character under Rule 98, Art. 1,
(*ante*, § 519).

² Courts differ on this point; but the above rule seems the
fairer.



600 *Par. (d) but not of bias or of interest, under Rule 102, 104 (ante, §§ 535, 546);— (W. § 1107.)*

601 [*Par. (e) nor of self-contradiction, under Rule 108 (ante, §§ 574-586);]¹*

602 *Par. (f) nor of error evidenced by contradiction, under Rule 107 (ante, §§ 567-572).²*

603 **RULE 111. Other Methods involving Moral Character.** The witness' good moral character may also be rehabilitated in the following ways:

ART. 1. Discrediting the Impeaching Witness. The impeaching witness who has testified to bad moral character may be discredited,

604 *Par. (a) by evidence of his own bad moral character, under Rules 97, 98 (ante, §§ 503, 519);*

605 *Par. (b) by requiring him to specify the particular rumors or statements that formed the basis of the bad repute as testified by him. — (W. § 1111.)*

Distinguish the cross-examination of a supporting witness as to rumors of misconduct (Rule 105, ante, § 557).

ART. 2. Denying or Explaining Bad Repute. The supposed bad reputation may be rebutted, — (W. § 1112.)

606 *Par. (a) by other testimony denying it;*

607 *Par. (b) by cross-examining the witness to the grounds of his assertion, under Rule 105 (ante, § 557).*

ART. 3. Denying or Explaining Particular Misconduct. After impeachment by evidence of particular acts of misconduct, either admitted on cross-examination or evidenced by record of conviction,

¹ The Courts are divided on this point.

² A few Courts are *contra*.

608 *Par. (a)* the misconduct may not be denied; except
by showing a pardon or reversal for a conviction;—
(W. § 1116.)

609 *Par. (b)* but it may be explained away
(1) by calling witnesses to good moral character, under
Rule 110 (*supra*, § 598);
(2) by the circumstances of extenuation, stated on re-
examination;¹—(W. § 1117.)
[(3) by any other explanation called for in fairness to
the witness].²—(W. § 1117.)

611 **RULE 112.** *After Impeachment by Bias, Interest, etc.* After
impeachment by evidence of bias, interest, self-contradiction,
or otherwise, the witness may be rehabilitated (W. § 1119)

- (1) by denying the evidential facts;
- (2) by explaining them away, as provided in Rules
102, 104, 108 (*ante*, §§ 535, 546, 574);
- or, (3) by any other mode appropriate in the circum-
stances;³
- but, (4) not by introducing good moral character,
pursuant to Rule 110 (*ante*, § 596).

TOPIC II:

REHABILITATION BY PRIOR CONSISTENT STATEMENTS

612 **RULE 113.** *Witnesses in General.* A witness' prior statement,
consistent with that now made by him on the stand, is not
admissible before impeachment. — (W. §§ 1122-1124.)

ART. 1. *Statements admissible after Impeachment.* Such
statements are admissible when relevant to rebut some im-
peaching evidence already introduced;
that is to say, they are

¹ Some Courts may hesitate here.

² This broad rule is not so stated by Courts, but seems
simple and adequate.

³ This general clause is needed to provide for new modes
not yet passed upon.

613 *Par. (a)* [not] admissible to rebut deficient *moral character*;¹ — (W. § 1125.)

614 *Par. (b)* [not] admissible to rebut *particular misconduct* admitted on cross-examination or evidenced by conviction of crime.² — (W. § 1131.)

615 *Par. (c)* [not] admissible to rebut *prior self-contradictions*,³ [unless the utterance of the alleged self-contradiction is denied and the consistent statements tend to support the denial]⁴; — (W. § 1126.)

616 *Par. (d)* [not] admissible to rebut a *contradiction by other witnesses*.⁵ — (W. § 1127.)

617 *Par. (e)* admissible to rebut evidence of *bias, interest, or corruption*, if made before the time of the supposed discrediting influence;⁶ — (W. § 1128.)

618 *Par. (f)* admissible to rebut circumstances indicating *recent contrivance* of testimony, if made before the time of the supposed contrivance; — (W. § 1129.)

Illustration. The defendant, if guilty, must have been at a place on the 14th, and could have been there once only; he testifies that he was there on the 7th; to corroborate this, his statement on the 9th, alluding to being there on the 7th, is admissible.

619 *Par. (g)* admissible to *corroborate testimony identifying* a person in court, when involving a former identification made before danger of false suggestion. — (W. § 1130.)

Cross-reference. This could also come in under Rule 89 (*ante*, § 443).

621 **RULE 114. *Special Classes of Witnesses.*** A prior consistent statement is also admissible for the following special classes of witnesses as herein prescribed:

¹ A few Courts admit. ² A few Courts admit.

³ A large number of Courts admit.

⁴ This bracketed clause represents the Michigan rule, which is sound and is accepted by a few Courts.

⁵ A few Courts admit.

⁶ Some Courts confuse this with the next case (*par. f*).

ART. 1. *Rape Complainant.* On a charge of rape, the
622 woman's failure to make fresh complaint being relevant as
a self-contradiction under Rule 108, Art. 4 (*ante*, § 586),
her making of complaint is admissible by way of rebuttal of
her supposed silence; — (W. § 1134.)
subject to the following provisions:

623 *Par. (a).* The mere fact of making complaint, including
its time, place, and addressee, is always admissible [if the
woman has testified.]¹ — (W. §§ 1135, 1136.)

624 *Par. (b).* The lapse of time between the alleged rape
and the complaint does not [usually] exclude.² — (W.
§ 1135.)

625 *Par. (c).* The *detailed statements* of the complaint, in-
cluding the identification of the man, are

(1) [admissible if the woman has testified, and if the
complaint was freshly made.]³ — (W. § 1138.)

(2) [admissible if the woman has testified and if some
impeaching evidence has been introduced.]⁴ — (W. § 1138.)

(3) [admissible under Rule 154 (*post*, § 1237) if the
complaint was freshly made, even though the woman does
not testify.]⁵ — (W. §§ 1139, 1760.)

626 [ART. 2. *Bastardy Complainant.* On an issue of bastardy
and the child's paternity, the mother's utterance in travail
identifying the father is admissible.]⁶ — (W. § 1141.)

627 [ART. 3. *Owner's Complaint after Theft.* On a charge
involving larceny or robbery, the complaint of the owner
or bailee, freshly made, is admissible.]⁷ — (W. § 1142.)

¹ A few Courts add this clause.

² Some Courts follow the bracketed word.

³ Many Courts adopt this form; but the second clause is
unsound.

⁴ Many Courts adopt this form, thus consistently applying
the ordinary Rule 113 above.

⁵ Some Courts adopt this form, making it an exception to
the hearsay rule.

⁶ A few Courts recognize this; all ought to. Statutes
occasionally provide for it.

⁷ Several Courts recognize this, usually with quibbling
qualifications.



[ART. 4. *Accused's Exculpations.* The exculpatory or explanatory statements of an accused, made freshly after notice of the accusation, are admissible.]¹ — (W. § 1144.)

Cross-references. Compare the rule for an *accused's* statements in *possession of stolen goods* (Rule 155, *post*, § 1245), an *accused's* statements indicating *mental condition* (Rule 153, *post*, § 1213), and an *accused's conduct* indicating *consciousness of innocence* (Rule 118, Art. 8, *post*, § 665).

¹ A few Courts accept this; but common sense demands its general extension; for the principle of Rule 113 (*ante*, § 618) applies.



SUB-TITLE IV: PARTIES' ADMISSIONS

TOPIC I: GENERAL PRINCIPLES

RULE 115. *Definition.* Any utterance, made by a party
630 (or by one for whom he is responsible under Rule 121, *post*,
§ 685), asserting any relevant fact, in express words or by
implication, and offered against the party, is termed an Ad-
mission, and is receivable. — (W. § 1048.)

(*Reason.* A party's admission is receivable on the same
principle as a witness' inconsistent statement offered to im-
peach his testimony (Rule 108, *ante*, § 574); because the
party has in theory placed himself in the attitude of disputing
not only the main issues but all the opponent's evidential
facts adduced in their support, and thus any utterance of
his which is consistent with any of the opponent's alleged
facts is thereby inconsistent with the first party's presumed
denial of them, and thus discredits that denial. Nor is it
usually necessary for the inconsistency to be shown as a
condition precedent, for the opponent's desire to use the
admission indicates that it has some such significance.)

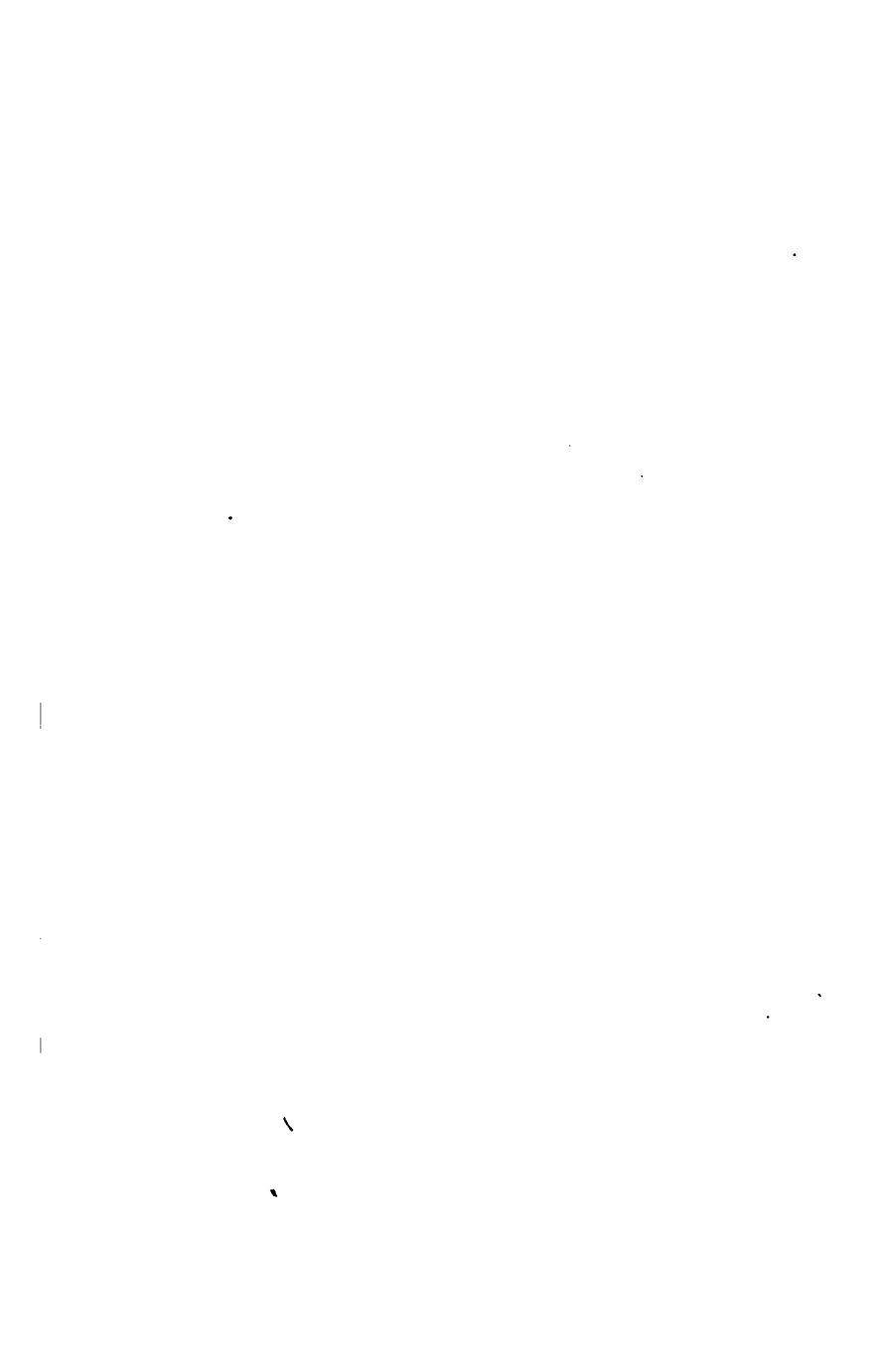
RULE 116. *Limitations not Applicable.* A party's admission
is not subject to the following limitations:

ART. 1. *Hearsay Exceptions.* A party's admission, not
631 being governed by the hearsay rule (Rule 134, *post*, § 910),
need not satisfy any of the exceptions to that rule, and is
therefore receivable,

Par. (a) though the facts stated were not *against*
interest at the time; — (W. § 1048.)

Par. (b) though the party is not *deceased* or otherwise
632 unavailable. — (W. § 1049.)

ART. 2. *Witness' Self-Contradictions.* A party's admission
633 is not subject to Rule 108, Art. 3 (*ante*, § 579) requiring



a witness to be warned by prior inquiry as to a supposed self contradiction. — (W. § 1051.)

ART. 3. *Witness' Qualifications.* A party's admission is
634 not subject to any rule prescribing testimonial qualifications
as to knowledge or the like. — (W. § 1053.)

ART. 4. *Not Conclusive (Estoppels; Solemn Admissions;
635 Explanations; Corroboration).* A party's admissions, being
merely evidential to discredit his present assertions and sup-
port the opponent's, are not conclusive; hence,

Par. (a) the rules of substantive law arising from
636 *estoppel, warranty, or the like*, do not apply; — (W. § 1056.)

Par. (b) the rules of pleading and practice, arising
637 from a *solemn admission, judicial admission, stipulation,*
or other *waiver* effecting a limitation of issues (Rule
231, *post*, § 2140), do not apply. — (W. § 1057.)

Par. (c) the party may introduce any suitable other
638 evidence supporting his case and contrary to the admissions;
in particular, any circumstances *explaining* the grounds for
an express admission, or *rebutting* the inference of an
implied admission under Rules 118-121, (*post*, § 664). —
(W. § 1058.)

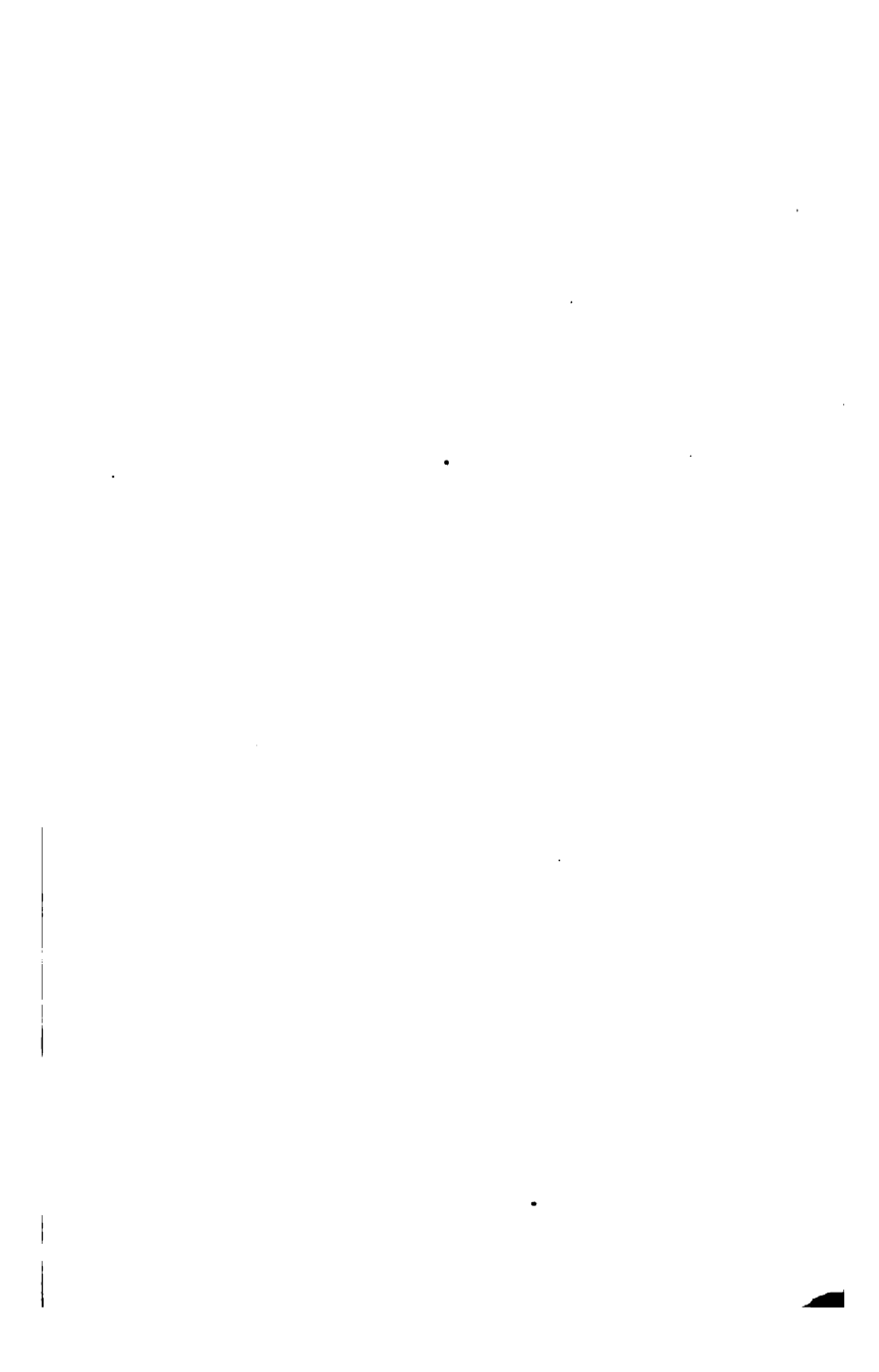
Cross-references. Compare the effect of the rule as to *putting
in the precise words or the whole* of an admission (Rule 185,
post, § 1575), and as to *testifying to one's meaning* (Rule 174,
post, § 1459).

Par. (d) the party may [not] introduce *other utterances* of
639 his, *consistent* with his present claim, on the conditions
applicable to a witness' corroboration under Rule 113,
Art. 1 (*ante*, § 613).¹ — (W. § 1126, n. 3, § 1133.)

Cross-reference. Compare the rule admitting such statements
when part of a *verbal act* (Rule 155, *post*, § 1245).

RULE 117. *Limitations applicable.* A party's admission is
640 subject to the following limitations for specific classes of
admissions:

¹ The "not" is law in most States.



Par. (a) the *confessions* of the *accused* in a criminal case are admissible only on the conditions named in Rule 122 (*post*, § 700), and when admitted they are not sufficient to sustain a conviction except on the conditions named in Rule 180, Art. 7 (*post*, § 1530.)

Par. (b) in issues involving *marriage* and *grounds for divorce* the party's admissions are sufficient to sustain a verdict or decree on the conditions named in Rule 181, Art. 3 (*post*, § 1537).

Par. (c) in issues involving a *document* a party's admissions as to its *contents* are receivable subject to Rule 127, Art. 2 (*post*, § 807), and as to its *execution*, subject to Rule 130, Art. 5 (*post*, § 852).

TOPIC II:

IMPLIED ADMISSIONS

641 RULE 118. *Sundry Implied Admissions.* Any conduct or utterance of a party may, in the circumstances of the case, be open to the inference that the party thereby expressed a belief in the truth of some fact; and is then receivable as an implied admission; subject to the further Rules 119-121, when applicable. — (W. § 1060.)

Distinction. An *express* admission is only an evidential fact (not conclusive; *ante*, § 635), *i. e.* merely permits an inference from it to the truth of the fact admitted; and this inference can be explained away by the party (*ante*, § 635). In an *implied* admission, there is needed an additional and prior inference, *i. e.* from the party's conduct or utterance to his belief, thus arriving at a point equivalent to an *express* admission. It offers thus two opportunities for rebuttal; viz. the rebuttal of the inference that there was an admission at all; and, next, the rebuttal or explanation of the admission, as for *express* admissions (*ante*, § 635).

Cross-reference. For the rule that the *precise words* of an admission must be offered, see Rule 183 (*post*, § 1549).

642 ART. 1. *Offer to Compromise.* An offer by one party to the other, *i. e.* if by a plaintiff, to accept compensation, and if by a defendant, to make compensation, being open to the infer-



ence that it proceeds only from a desire to end controversy and not from a concession of the correctness of the opponent's case, is not receivable. — (W. §§ 1061, 1062.)

643 *Par. (a).* An express admission, though made in course of negotiations for settlement of a claim, is receivable.

644 *Par. (b).* Whether a statement is receivable under the present rule does not depend upon whether it is made with a request for secrecy, or with a proviso "without prejudice," or in the course of negotiations for settlement of a claim.¹

Illustrations. (1) In an action for money owed for broker's commissions to the amount of \$100, the defendant writes to the plaintiff's attorney offering to pay \$50 if he will give a release; this offer is not admissible; but if the letter contains the express statement that the plaintiff did earn \$100 in commissions but that there is a set-off of \$50, and thus the defendant is willing to pay \$50 to settle, the express admission is receivable; and it is immaterial whether the letter is headed "confidential" or "without prejudice."

(2) In an action for injuries received in a railroad collision, the defendant's payment of money for a release from another person injured in the same collision is not receivable; but his express statement, made to the other person, "We are responsible for this collision," is receivable.

645 *Par. (c).* An offer to *confess judgment*, or a *payment of money into court*, made according to a rule of procedure for the purpose of limiting the issues or of affecting the costs of suit, is not receivable as an admission.²

Cross-reference. For the scope of *privileged communications with attorneys*, see Rule 205 (*post*, §1765).

647 ART. 2. *Measures of Prevention or Remedy.* A party's conduct in taking measures to prevent a future harm or to remedy a past harm is receivable, if in the circumstances of the case it is open to the inference that it proceeds from a belief in the facts as alleged by the opponent.³ — (W. § 282.)

¹ This article represents the rule now accepted in the best opinion; though in many Courts there are rulings which incorrectly emphasize one or another phase of it.

² Statutes sometimes so declare.

³ Here much must depend on the trial Court's discretion (Rule 18).

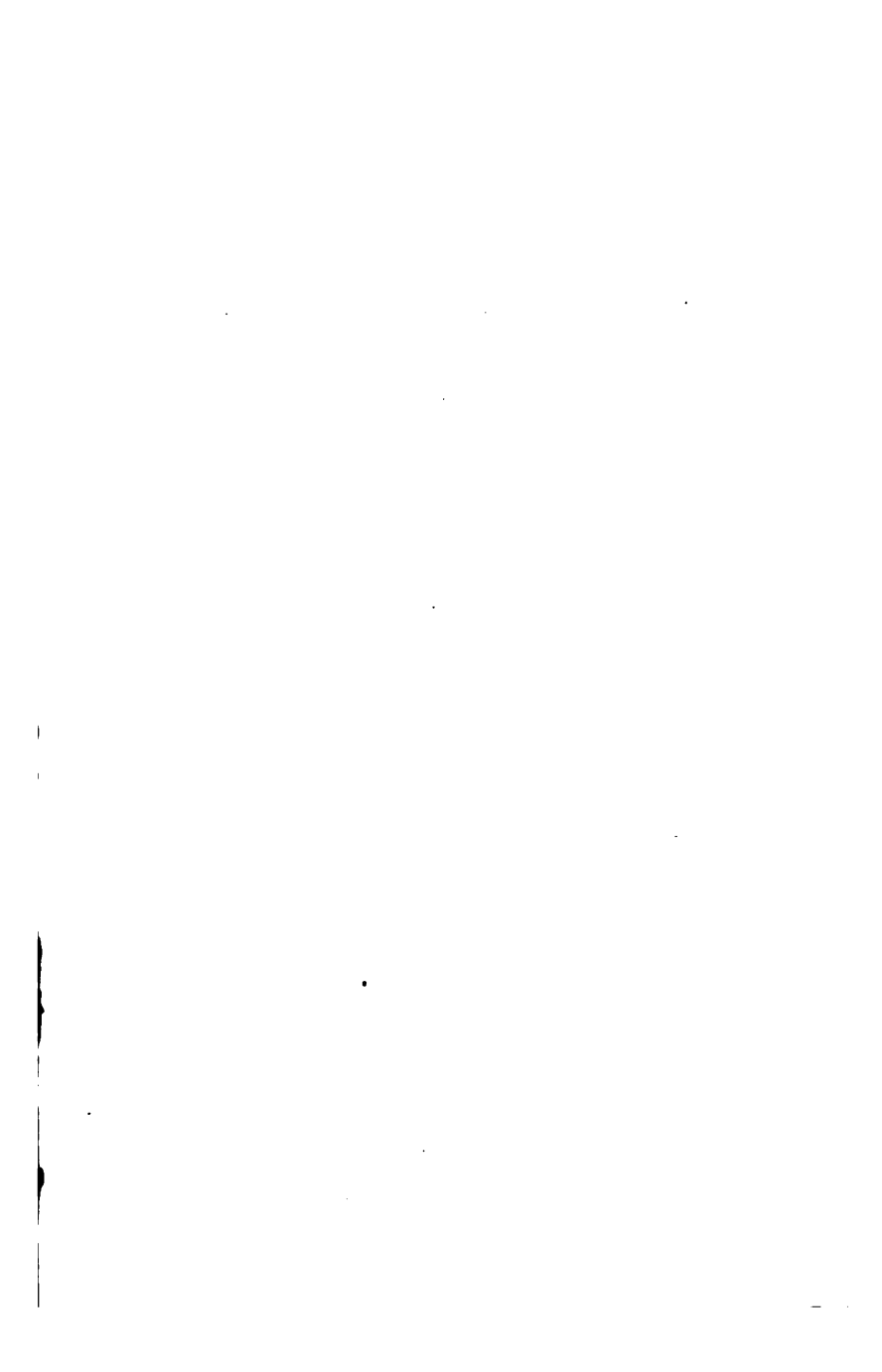


Illustration. In an action for injury by the bite of a vicious dog, the owner's habit of keeping the dog tied by a strong chain is evidence of his admission that the dog is vicious.

648 *Par. (a).* The placing of *insurance* against a particular risk of damage or liability is not receivable. — (W. §§ 282, 393, 949, 969.)

649 *Par. (b).* The *repairing* of a machine, place, or other thing, after the happening of an injury thereat, is not receivable. — (W. § 283.)

Distinguish (1) an *act of control* over a place, by making repairs, etc., as indicating who is in possession;

(2) *change of condition* of a place or machine, caused by repairs, as relevant under Rules 72, 73 (*ante*, §§ 341, 344);

(3) the *custom of other persons*, in taking precautions to prevent injury, as relevant to the standard of care or reasonableness, under Rule 73 (*ante*, § 354).

650 ART. 3. *Personal Demeanor in Evasion of an Arrest, Charge, or Suit.* A party's conduct before, at, or after the time of being arrested, charged, or sued, is receivable, if in the circumstances of the case it is open to the inference that it proceeds from a belief in the truth of the case alleged against him;¹ — (W. § 273.)

in particular,

651 *Par. (a)* his *demeanor* during trial.² — (W. § 274.)

652 *Par. (b)* his *flight, escape, resistance, or concealment.* — (W. § 276.)

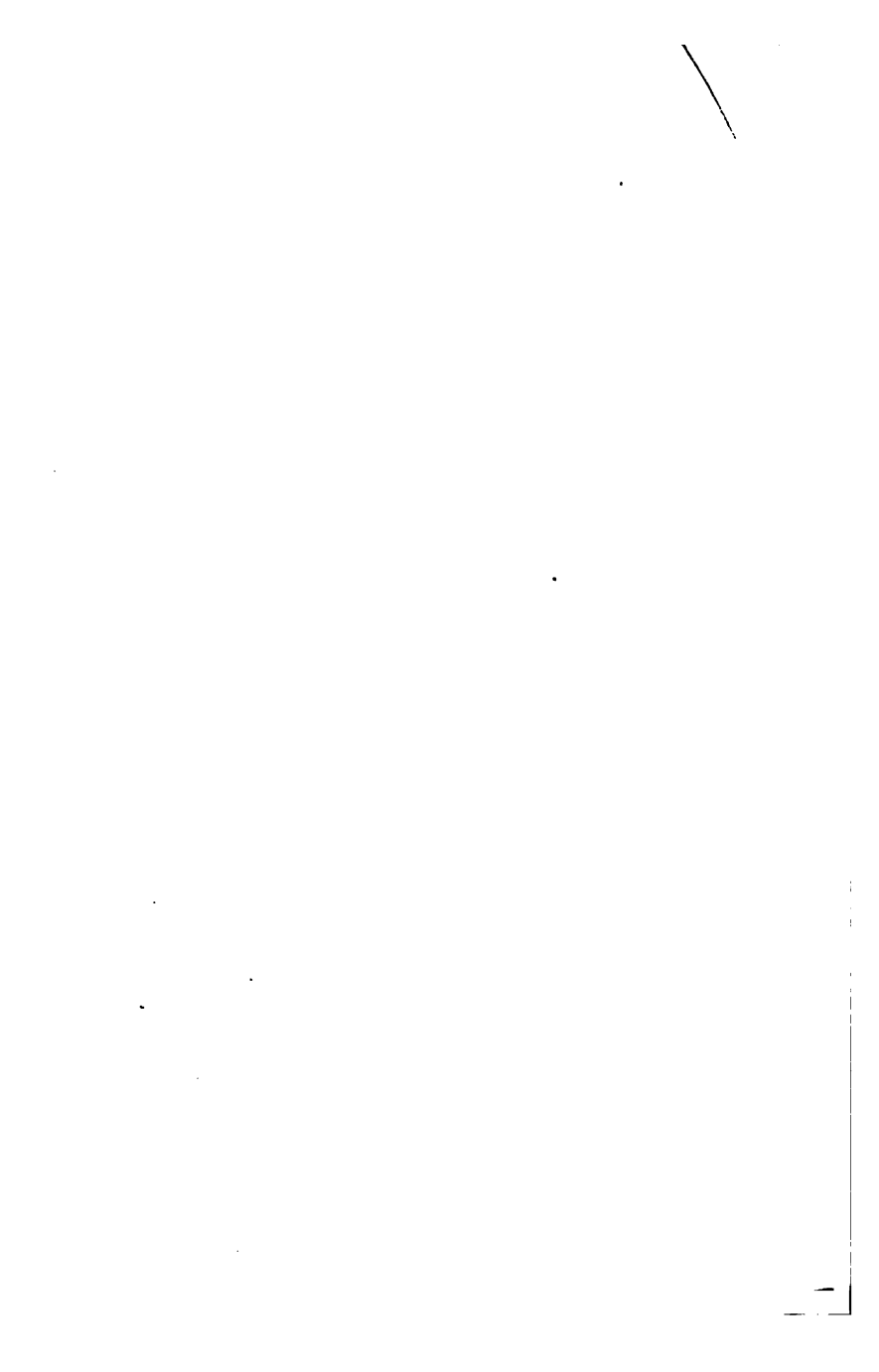
Cross-reference. That the accused may explain away the inference by showing subsequent voluntary submission, etc., is noted *post*, Art. 8 (§ 665).

653 *Par. (c)* but not his *transfer of property* to avoid execution on a possible judgment.³ — (W. § 282, n. 2.)

¹ Here the rule of trial Court's discretion should be supreme (Rule 18, *ante*, § 49).

² This is always admissible, without rules as to specific forms of demeanor; except in Illinois.

³ This is the state of the rulings, and seems fair.



ART. 4. *Fabrication and Suppression of Evidence.* A party's
 654 conduct in personally falsifying evidence,
 in falsely fabricating it,
 in taking measures to destroy or suppress it,
 in bribing,
 or the like,
 is receivable. — (W. § 278.)

Distinctions. (1) The *impeachment of a witness* by his acceptance or offer of a bribe, under Rule 103, (*ante*, § 540), is a different thing.

(2) An *accused's false statement* admissible under the present rule, is not an *express confession* subject to Rule 122 (*post*, § 701).

(3) A *falsely evidenced alibi* is open to the present inference, but not an alibi that merely fails in proof (W. § 279, n. 1); a failure to offer available evidence of an alibi is admissible under Art. 6 (*post*, § 658).

655 *Par. (a).* Such conduct in *another litigation* is receivable, provided the issue or the supposed motive is substantially the same. — (W. § 280, n. 1.)

Distinguish the use of other frauds as evidence of *intent* under Rule 65 (*ante*, § 301).

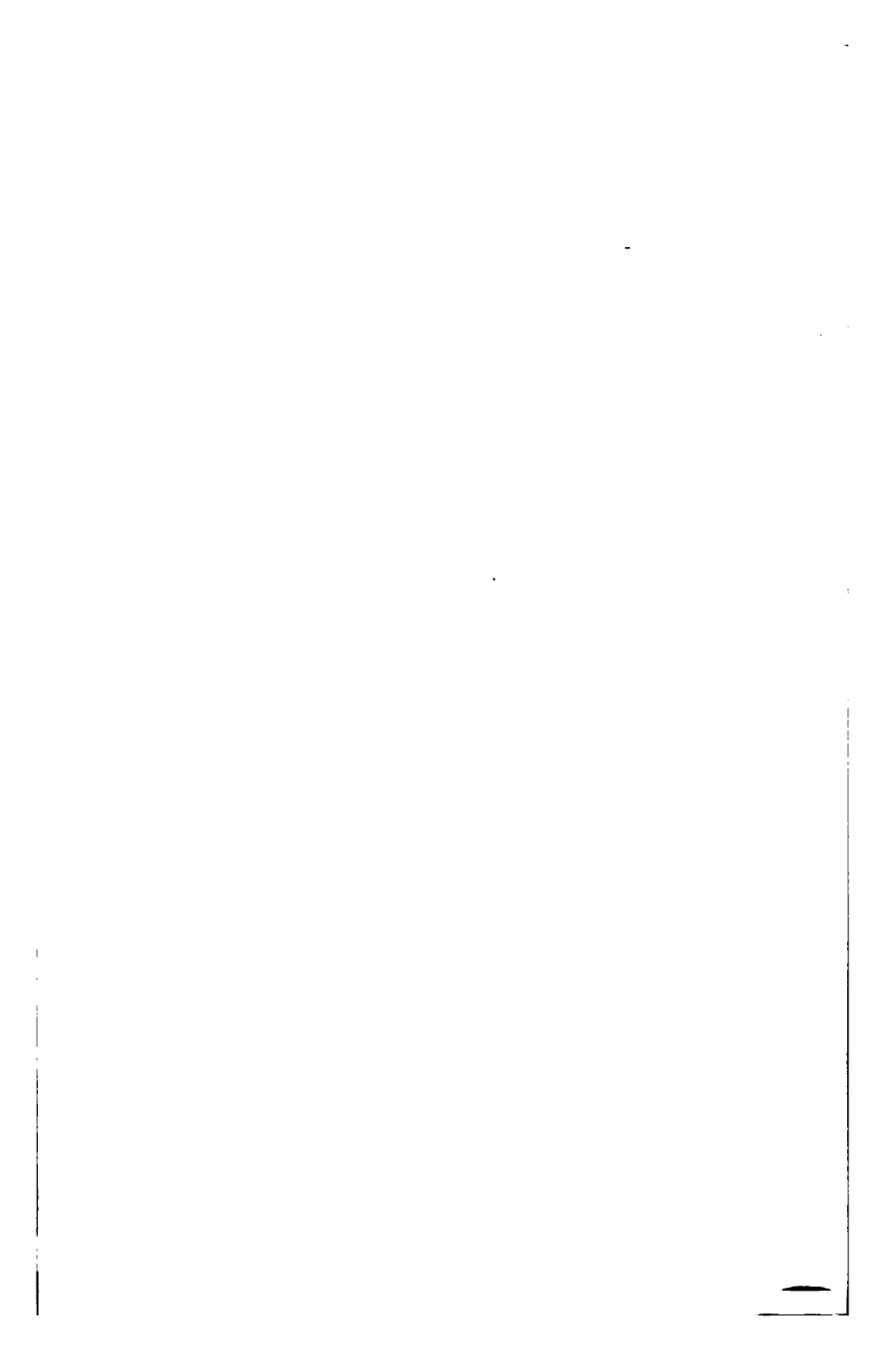
656 *Par. (b).* Such conduct by a *third person* is not receivable as an admission unless the party's connivance therewith is evidenced.¹ — (W. § 280.)

ART. 5. *Failure to Sue, Claim, Prosecute, or Defend.* A
 657 party's failure, delay, or reluctance to sue, prosecute, defend, or make claim, is in the circumstances of the case receivable.²
 — (W. § 284.)

Cross-references. In the following instances the rule is illustrated, but the question arises whether the failure may be explained away by certain evidence: (1) the *woman's complaint of rape* (Rule 114, *ante*, § 622); (2) the *mother's naming of a bastard's father* (Rule 114, *ante*, § 626); (3) the *owner's complaint of robbery* (Rule 114, *ante*, § 627); (4) the *accused's explanation of the possession of stolen goods* (Rule 155, *post*, § 1245).

¹ Courts are here commonly too strict.

² This is universally conceded; but the circumstances should control.



ART. 6. *Failure to Produce Evidence.* An inference may be drawn from a party's failure to offer in evidence some relevant circumstance, witness, document, or chattel, which would apparently be so useful to support his case or to rebut the opponent's that its use as evidence would be natural; provided the evidence be not unavailable to the party by reason of his ignorance or its physical situation or the disqualification or privilege of a witness.¹ — (W. §§ 285-287.)

659 *Par. (a).* If the unproduced evidence is *available for both parties*, the inference may [not] be drawn against either.² — (W. § 288.)

660 *Par. (b).* The inference may be applied, in a *civil* trial, to a party's failure to *testify himself*; but otherwise in a *criminal* trial, pursuant to Rule 203 (*post*, § 1746). — (W. §§ 289, 290.)

Cross-references. For the distinction in a criminal trial between the accused's failure to *testify* and failure to *introduce* other evidence, see the same Rule 203, § 1748.

661 *Par. (c).* The inference that may be drawn is that the fact which might have been evidenced by the unproduced evidence is not of the tenor alleged by the party failing to produce. — (W. § 290, n. 9.)

662 *Par. (d).* Where the issue is as to the nature of a *chattel* or the *contents* of a *document* alleged to *exist*, the inference from non-production alone is not sufficient, without some other evidence of its identity with the chattel or document alleged.³ — (W. § 291.)

Cross-reference. For the inference as to *execution* of a document, see Rule 189 (*post*, § 1597).

For the *presumption*, see Rule 228 (*post*, § 2069).

663 *Par. (e).* Where the issue is as to the *non-existence* of a document, the supposed possessor's failure to produce

¹ This rule is difficult to phrase, but its details tend to become mere quibbles.

² The affirmative is the most practical solution; Courts hold variously.

³ This rule is variously phrased.



it may permit an inference as to its non-existence.¹ — (W. § 291, n. 12.)

ART. 7. *Explanations.* The party against whom any of the
664 foregoing sorts of conduct is offered may introduce any circumstance relevant to explain away the inference and thus to rebut the implied admission. — (W. § 277, n. 7, § 281, § 290, n. 8.)

ART. 8. *Accused's Innocent Conduct.* In a criminal trial, the
665 accused, to rebut the inference that might possibly be drawn from his supposed conduct in failing to deny or otherwise, may [not] introduce his conduct and utterances, after the act charged, tending to evidence his consciousness of innocence.² — (W. § 293.)]

Illustrations. Voluntary surrender to the police; protestations of innocence; assistance in searching for the perpetrator, etc.

Cross-reference. Compare Rule 114, Art. 4 (*ante*, § 628), and Rule 153, Art. 3 (*post*, § 1213), admitting an accused's explanatory statements.

RULE 119. *Admissions by Implied Assent to a Third Person's*
666 *Statement.* A statement made by a third person under such circumstances that the party's assent to it may be implied is receivable as an implied admission of the party; — (W. § 1071.)

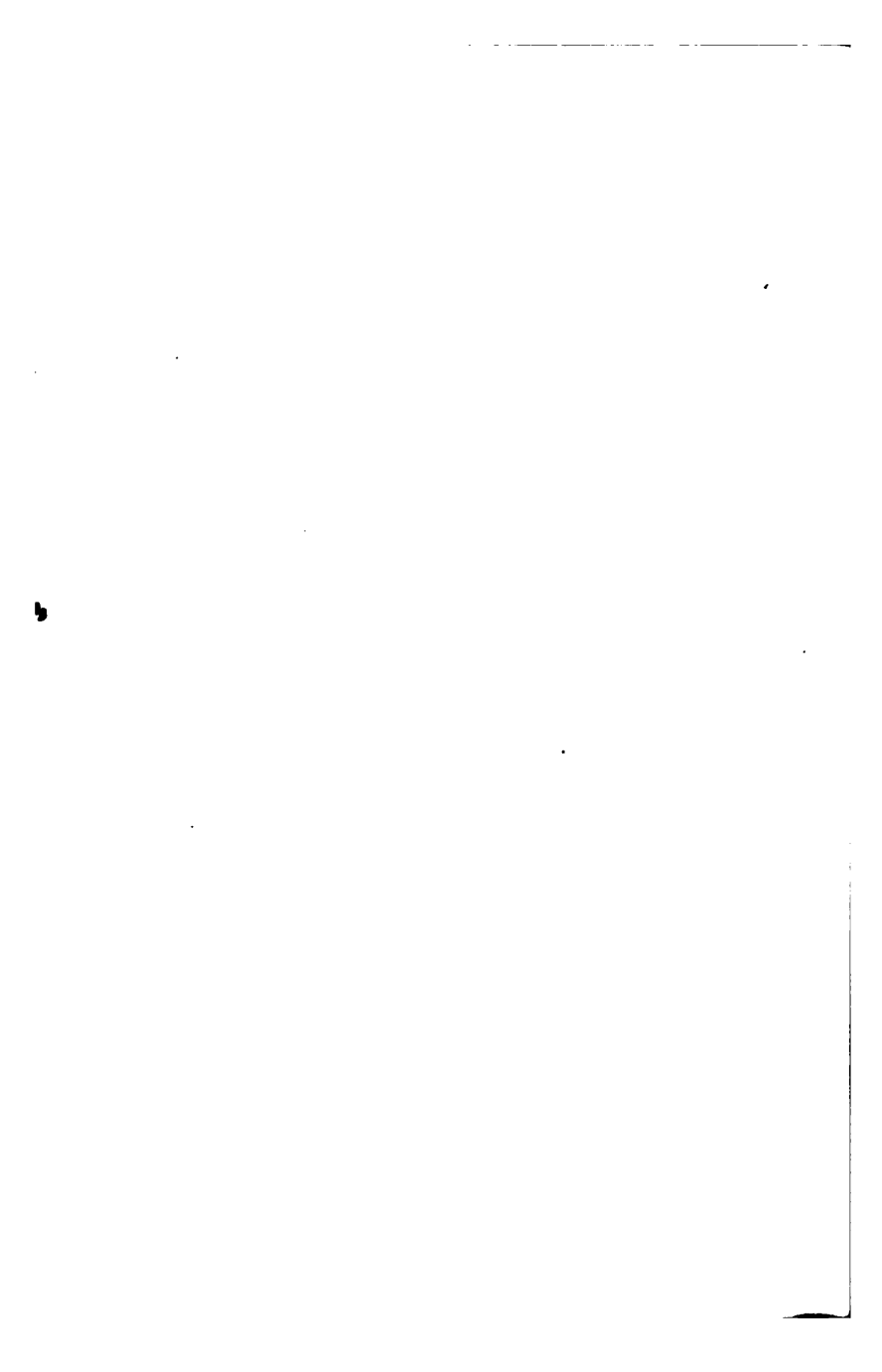
subject to the following detailed rules:

ART. 1. *Statements by a Person Referred to.* A statement
667 made by a third person named by the party as one whose expected utterance he refers to and approves beforehand is receivable. — (W. § 1070.)

ART. 2. *Statements in a Party's Presence.* A statement
668 made in a party's presence and not disputed or modified by him is receivable; provided in the circumstances that he

¹ A number of statutes apply this specifically to liquor-licenses, game-licenses, etc.

² Only a few Courts concede the affirmative; but it is nevertheless good sense.



probably heard it and that it was a statement likely to have elicited a correction if it were in his belief incorrect.¹ — (W. § 1072.)

Illustrations. (1) In an action for land, a conversation held between A and B concerning the boundary, in the presence of the now claimant, but before he had any interest in the title, is not admissible.

(2) In an action on an insurance policy, defended on the ground of misrepresentations as to health, the insured's acceptance of sick-benefit payments from a fraternal society is evidence of his admission that he was ill at the time.

ART. 2. *Statements in Judicial Proceedings.* Where the statement was made in the course of a judicial proceeding, the silence of a person present does not ordinarily permit the inference of his assent; — (W. § 1072:)
in particular,

Par. (a) when it was made by a *witness, counsel, or public officer* in the course of his duty;

Par. (b) when it was made by a *police officer* [or other person] in the presence of an accused.² — (W. § 1072.)

Cross-references. Compare the rules for (1) *failure to testify*, as an admission under Rule 118 (*ante*, § 658), (2) *failure to testify*, as a self-contradiction impeaching a witness under Rule 108 (*ante*, § 586).

ART. 3. *Writings in Possession.* Where the statement is contained in a writing sent to the party or found in his possession, the inference of assent may be drawn from the party's failure to reply or otherwise to express his denial, if the circumstances would naturally elicit one; — (W. § 1073.)
in particular, when the statement is

Par. (a) a statement of a *claim for liability*;

Par. (b) a statement of *account*.

Distinguish the rule as to *Knowledge* (Rule 62, *ante*, § 289).

ART. 4. *Writings Used.* Where the statement is in a writing used by the party, the inference of assent may be

¹ There are here various phrasings; the circumstances should control.

² Many Courts extend this to statements by private persons to an accused under arrest; but that is going too far; it depends on the circumstances.



drawn, unless in the circumstances there is an implied repudiation;

in particular, it may be drawn when the statement is

673 *Par. (a) in proofs of loss presented by the beneficiary under an insurance policy.*¹ — (W. § 1073, n. 5.)

674 *Par. (b) in account-books of a partnership, as against a partner.*

675 *Par. (c) in account-books of a corporation, as against a stockholder [who has had access to them.]*² — (W. § 1074, n. 6.)

676 *Par. (d) [but not] in stock-books of a corporation, as against one denying that he is a stockholder.*³ — (W. § 1074, n. 8.)

Cross-reference. The books may nevertheless be admitted, under the exception to the hearsay rule, as regular entries (Rules 142-3, *post*, §§ 1002, 1018).

677 *Par. (e) in depositions, affidavits, and other forms of testimony introduced by party, if knowingly used for the purpose of evidencing the specific fact asserted.* — (W. § 1075.)

Cross-reference. Compare the rule for *pleadings* (Rule 120, *post*, § 680).

TOPIC III :

ADMISSIONS IN PLEADINGS

680 **RULE 120. General Principle.** Since the admissions of an attorney or counsel in the management of a litigation are receivable against the party-client pursuant to Rule 121 (*post*, § 687), the documents of pleading filed in litigation by an attorney or counsel may be introduced against the party; subject to the following exceptions and details:

¹ On the point of *conclusiveness*, the opposite is generally and properly held.

² Therefore ordinarily excluded, as most Courts hold.

³ Most Courts however admit them, but on the other theory above mentioned.

ART. 1. *Common-Law Pleadings in the Same Cause.* All documents of pleading filed in the same cause at common law, being conclusive waivers of proof under Rule 231 (*post*, § 2140), may be referred to by counsel as admissions without formal offer in evidence.¹ — (W. § 1064, n.)

Par. (a). Except that a pleading on a separate issue in the same cause, being intended to avoid dispute apart from that separate purpose, cannot be so used. — (W. § 1064, n. 2.)

ART. 2. *Chancery Pleadings in Other Causes.* A pleading of the party in another cause in chancery is receivable evidentially as an admission in the present cause,

(a) if it be an answer.

[(b) or a bill.]² — (W. § 1065.)

ART. 3. *Common-Law Pleadings in Other Causes.* A pleading of the party in another cause at common law is

[(1) not receivable.]

[(2) receivable evidentially as an admission in the present cause, so far as the statements are not expressly hypothetical,

(a) if the party signed the pleading

(b) or had personal knowledge of its contents.]³ — (W. § 1066.)

ART. 4. *Superseded or Amended Pleadings.* A party's pleading, now withdrawn or changed by amendment, is [not] receivable evidentially as an admission in its original tenor.⁴ — (W. § 1067.)

TOPIC IV:

ADMISSIONS BY CO-PARTIES, AGENTS AND PRIVIES

RULE 121. *General Principle.* An admission made by another person than the party is receivable against the party

¹ This is not law in Massachusetts.

² Many Courts are *contra*; some agree, if the bill is sworn to.

³ In Common-law States Clause (2) is not law. In Code States it is, though clause (b) is not recognized by all. Neither clause (a) nor clause (b) is sound.

⁴ The majority of Courts accept the affirmative.



when that other person is so united in interest on the subject of the admission that his acts may in the substantive law affect the party. Subject to the provisions of the substantive law thus determining the question, the following rules apply: ¹

ART. 1. *Nominal, Representative, and Joint Parties.* The statement of another person is not receivable by reason of his being a nominal party, or a co-party (civil or criminal); and the statement of the same natural person made in another capacity (trustee, guardian, etc.) is receivable against him in that capacity only. — (W. § 1076.)

ART. 2. *Privies in Obligation (Promisor, Agent, Attorney, etc.).* The statement of the other person is receivable whenever he is by the substantive law one who could at the time make the party liable in the class of matters mentioned; — (W. §§ 1077-1079.)

that is, among others,

- (a) a co-promisor;
- (b) a principal debtor;
- (c) an agent; ²
- (d) an attorney-at-law;
- (e) a partner;
- (f) a wife or husband;

Cross-reference. For the privilege against using them, see Rule 202 (*post*, § 1713).

- (g) a co-conspirator;

Cross-reference. For the order of evidence here, see Rule 163 (*post*, § 1352).

- (h) a joint tortfeasor.

ART. 3. *Privies in Title; 1. Co-existent Interests (Co-obligee, Co-legatee, etc.).* So far as a title or interest, as claimed

¹ The whole matter depends on the substantive law, and may be condensed in a code of evidence, only for the purpose of discriminating those points where the substantive law enters.

² The phrase *res gestae* is here not used; it merely confuses. The above phrasing is more liberal than the rule as now enforced in practice.



by a party, could be affected, under the substantive law, by the acts of another person claiming a co-existing interest in the same property, the statements of the other person are receivable against the party as admissions. — (W. § 1081.)

689 *Par. (a).* The statements of the other co-claimant are in any case receivable as against himself when he is joined as a party in the litigation.

Illustration. A co-legatee's admissions of the testator's insanity, though they may not be receivable as admissions against the other legatees, would still be receivable against himself if a party.¹

690 *Par. (a).* The foregoing principles receive application to

- (1) *co-tenants;*
- (2) *co-trustees;*
- (3) *co-obligees in contract;*
- (4) *co-legatees.*

691 ART. 4. *Privies in Title: 2. Successive Interests, depending on Death or Act of Law (Decedent, Insured, Bankrupt).* So far as a title or interest, as claimed by the party, could be in the substantive law affected by the acts of another person, whose interest has been acquired after death or by act of law, the statements of that person are receivable as admissions; — (W. §§ 1080, 1081.)

that is, among others, the statements, made while still claiming an interest, of

- (a) the *decedent* of an heir, legatee, executor, or administrator;
- (b) the *ward* of a guardian or conservator;
- (c) the *insured* of the beneficiary of a life-insurance policy;
- (d) the *debtor* of a creditor levying legal process.

692 ART. 5. *Privies in Title; 3. Successive Interests, depending on Grant, Sale, or Indorsement.* So far as a title or interest, as claimed by the party, could be affected by the acts of another person whose interest has been acquired by grant,

¹ This is in most Courts not law as regards co-legatees.



sale, or indorsement, the statements of that person are receivable as admissions; — (W. § 1082.)

that is, the statements made

693 *Par. (a) by a grantor of realty, while still claiming an interest therein. — (W. § 1082.)*

Distinctions. (1) The exception to the hearsay rule, for statements of *facts against interest* (Rule 139, *post*, § 968), may also serve, if the declarant is *deceased*.

(2) The rule for *producing the original document of title* may exclude such statements, if the admissions refer to the contents of the document (Rule 127, *post*, § 807).

(3) The scope of the hearsay rule, for declarations of *intent* (Rule 153, *post*, § 1207) has in a few States sufficed for receiving the admissions of a debtor-grantor where creditors aim to set aside a transfer as being made with fraudulent intent. — (W. § 1082, n. 6.)

694 *Par. (b) by a grantor of personalty, while still claiming an interest therein.¹ — (W. § 1083.)*

695 *Par. (c) by a prior holder of a negotiable instrument, while still claiming an interest, in so far as the transfer does not free it from equities and other personal defences.² — (W. § 1084.)*

696 *Par. (d) but not by a grantor, of realty or of personalty, when made after transfer of interest. — (W. § 1085.)*

697 *Par. (e) and, in particular, not by a grantor, of realty or personalty, when made after transfer of interest, where the grantor is a debtor and the statements are offered by an attaching creditor against a transferee in alleged fraud of creditors.³ — (W. § 1086.)*

Distinguish the following rules under which the evidence may nevertheless be receivable:

(1) The rule for *co-conspirators' admissions* (*ante*, Art. 2, § 687) which receives the statements after other evidence of a conspiracy between grantor and grantee is introduced;

¹ In New York this is not law, except to a limited extent.

² This also is not law in New York.

³ All Courts concede this; but most recognize the admissibility of the statements under one or more of the other rules distinguished.

(2) The rule for declarations *accompanying possession* and corroborating the presumption of ownership from possession (Rule 155, *post*, § 1245).

(3) The rule for declarations of *intent*, indicating an intent to defraud (Rule 153, *post*, § 1207).

698 *Par. (f)* but statements not receivable, under *Par. (e)* against the transferee, are receivable against the creditor, whose claim assumes that the debtor's interest did not cease until the time of levy. — (W. § 1087, n. 3.)

TOPIC V:

ACCUSED'S CONFESSIONS

700 **RULE 122. General Principle.** An admission, made by the defendant on trial, and stating expressly his doing of the act charged or some essential part of it, is termed a Confession.

When not made in open Court, it is inadmissible if it was made under circumstances involving such a hope of benefit or fear of harm as was likely to induce a false confession; subject to the following details and qualifications. — (W. § 822.)

Cross-references. (1) For the rule that the *whole* of the confession must be put in, see Rule 183 (*post*, § 1549).

(2) For the rule as to the *conclusiveness* of a *magistrate's* report of a confession, see Rule 131 (*post*, § 891).

(3) For the admissibility of a *co-conspirator's* confession, see Rule 121, Art. 2 (*ante*, § 687).

(4) For the admissibility of a *third person's* confession under the hearsay exception, see Rule 139 (*post*, § 968).

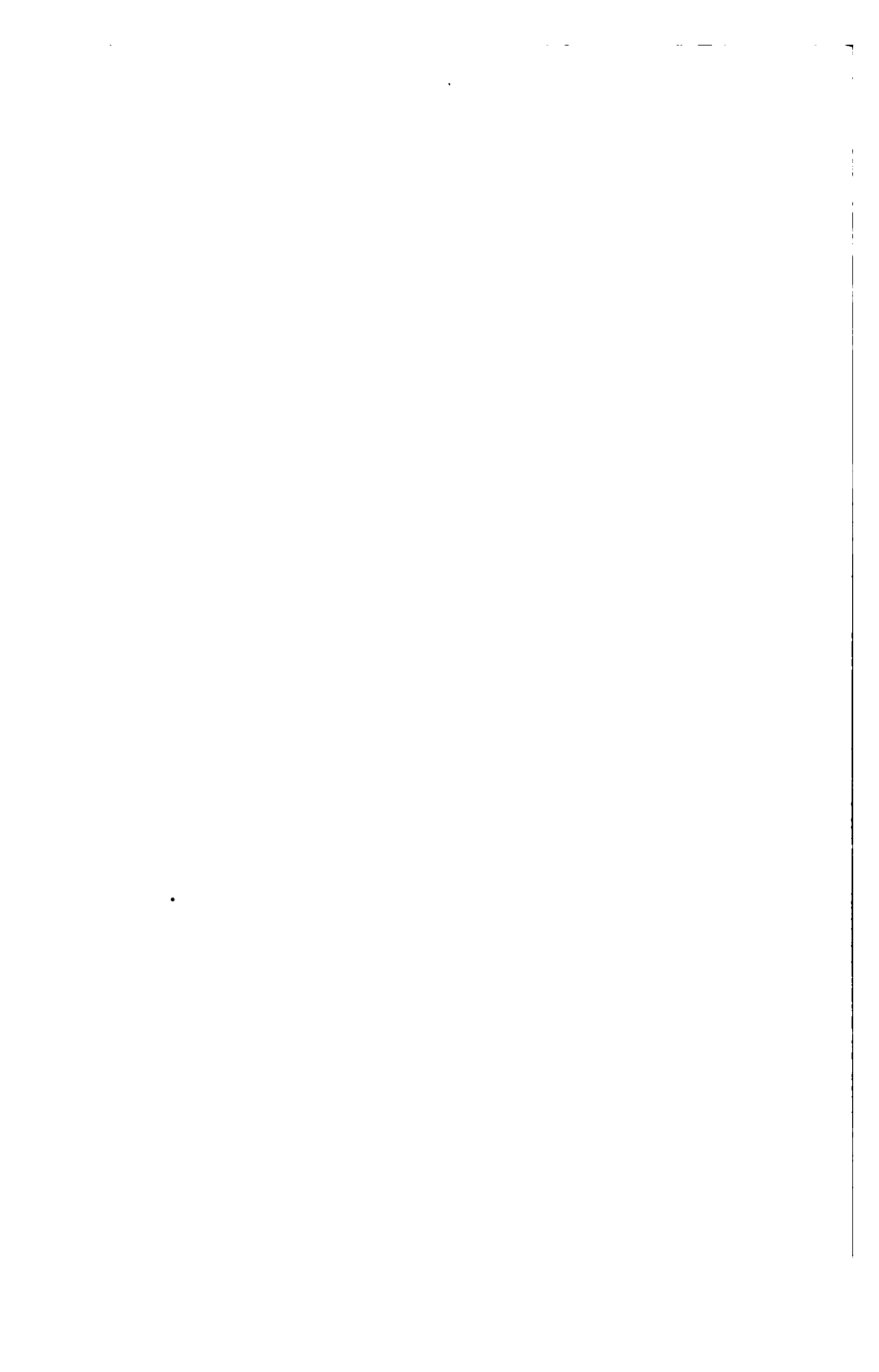
(5) For the necessity of *corroboration* of a confession when admitted, see Rule 180 (*post*, § 1530).

701 **ART. 1. Definition of Confession.** The rule for excluding confessions does not apply — (W. § 821.)

(a) to the *conduct* of an accused evidencing guilty consciousness, under Rule 118 (*ante*, §§ 641-658);

(b) to the accused's *exculpatory* statements, denying guilt;

(c) to the accused's admission of a *subordinate fact*, not essential to the criminal act charged.



Illustrations. The accused, on a charge of murder, makes a statement admitting the buying of the knife on the day before and alleging (falsely) that he had been threatened by the deceased on a former occasion, and also offers a witness money to testify to such threats; none of this evidence is governed by the rule for confessions.

702 ART. 2. *Nature of the Inducement, in general.* The nature of the inducement of hope or fear likely to evoke a false confession may be further tested by the following rules:— (W. §§ 824, 831.)

703 [Par. (a). The confession is inadmissible if it was made under the influence of a threat or promise of such a nature that this particular man under these circumstances would thereby be fairly likely to confess falsely.]¹— (W. § 824.)

704 [Par. (b). The confession is inadmissible if it was made under the influence of a threat or a promise.]²— (W. § 825.)

705 [Par. (c). The confession is inadmissible if it was not voluntary.]³— (W. § 826.)

706 ART. 3. *Person in Authority.* A threat or a promise, to make the confession inadmissible, must come from [some person having apparent power to fulfil the threat or the promise;

and, if the threat or promise concerns the result of the legal proceedings, it must come from some person having influence over the prosecution.]⁴— (W. §§ 827-830.)

ART. 4. *Specific Threats and Promises.* In applying the principle to specific threats or promises, in the absence of other controlling circumstances the following rules apply: ⁵

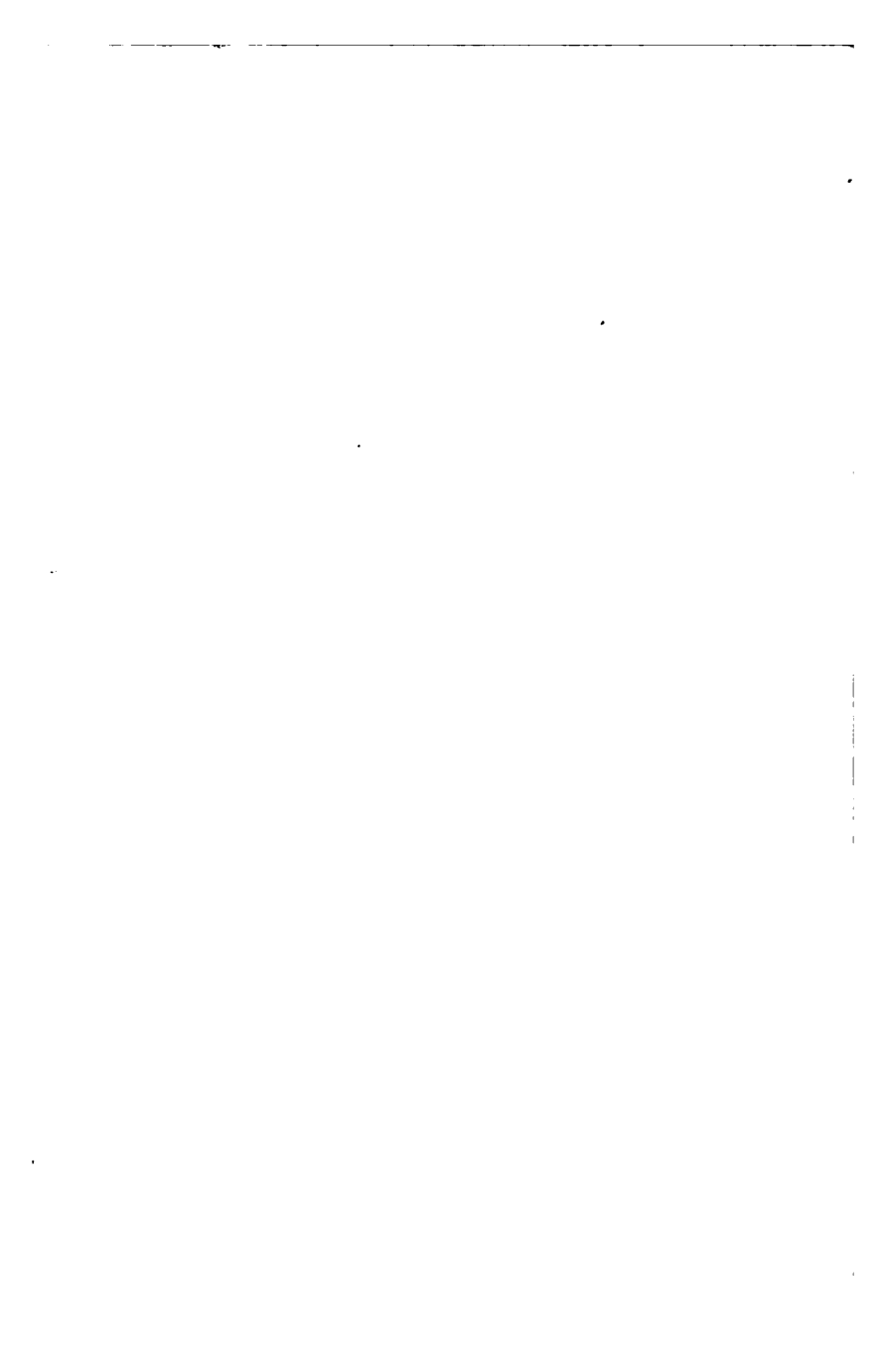
¹ This is the orthodox test; the other two are unsound.

² Many Courts use this broader test.

³ Most Courts say this; but of itself it signifies nothing apart from the further details.

⁴ Courts differ widely in this respect. The above rule represents a fair medium.

⁵ The ensuing rules ought not to be used as such; but they are, in the law of to-day.



707 *Par. (a)* a confession influenced by the advice that it would be *better to tell the truth* is [not] admissible.¹ — (W. § 832.)

708 *Par. (b).* A confession influenced by a *threat of corporal violence* is inadmissible. — (W. § 833.)

709 *Par. (c).* A confession influenced by a *promise of pardon* is inadmissible. — (W. § 834.)

710 *Par. (d).* A confession influenced by a promise of *lighter punishment*, milder treatment in prison, cessation of prosecution, release from arrest, or non-arrest or non-prosecution, is not admissible.² — (W. §§ 835, 836.)

711 *Par. (e).* A confession influenced by the assurance that what is said will be *used for him*, or *against him*, is admissible. — (W. § 837.)

712 *Par. (f).* A confession influenced by the advice that he had *better confess* is not admissible.³ — (W. § 838.)

713 *Par. (g).* A confession influenced by *religious or moral exhortations* is admissible. — (W. § 840.)

714 *Par. (h).* A confession influenced by a *trick* or *fraud* is admissible. — (W. § 841.)

715 ART. 5. *Mental Incapacity.* A confession made during intoxication or other influence disturbing the mental condition is admissible, unless the person was at the time wholly irresponsible mentally.⁴ — (W. §§ 499, 500.)

716 ART. 6. *Confessions during Legal Proceedings.* The mere fact that the person while confessing was

(a) under arrest, or

(b) under examination by a magistrate, with or without oath,

¹ A majority of Courts accept the negative.

² Probably every Court would accept this; though it is unsound as a fixed rule.

³ This is unsound; but practically all Courts so hold.

⁴ There is little authority; but it is wiser to admit such confessions except in extreme cases.



does not, of itself and apart from any of the preceding rules, render a confession inadmissible; except as follows;¹ (W. §§ 842-846.)

717 Par. (a). The mere fact of *arrest*, or of interrogation by a police officer while under arrest, does not exclude.² — (W. §§ 847, 851.)

718 Par. (b). The fact of being *under examination as accused without oath* before a magistrate does not exclude.³ — (W. §§ 848, 852.)

719 Par. (c). The fact of being *under examination as accused on oath* before a magistrate, does not exclude
 (1) [unless the answers are not made voluntarily.]
 (2) [unless the answers are made in ignorance that he is privileged not to answer.]⁴ — (W. §§ 849, 852.)

720 Par. (d). The fact of being *under examination as a witness on oath* does not exclude

(1) [unless after claim of privilege an answer is compelled in violation of the privilege against self-crimination under Rule 203 (*post*, § 1740.))⁵

(2) [unless under the circumstances the witness is virtually in the position of an accused and the answers are not made voluntarily.]⁶ — (W. §§ 850, 852.)

¹ No Court yet accepts the above broad principle; but it is thus stated in order to make more separable the ensuing exceptions, some of which totally undermine the rule as first stated.

² This is law everywhere except in Texas and perhaps in England.

³ This is law in England, but not in many American States; it is law in others; in still others it is law when the additional clause in Par. (c) is fulfilled.

⁴ This is not law in England, by statute. In the United States some Courts accept the simple rule without brackets; others add one or the other of the two bracketed clauses; a few follow the English rule.

⁵ This is the rule in England and in many States.

⁶ This is the rule in some States which accept clause (1) under Par. (c) above. Still other States have slightly differing details.

The sound rule in all four paragraphs is the portion without brackets.

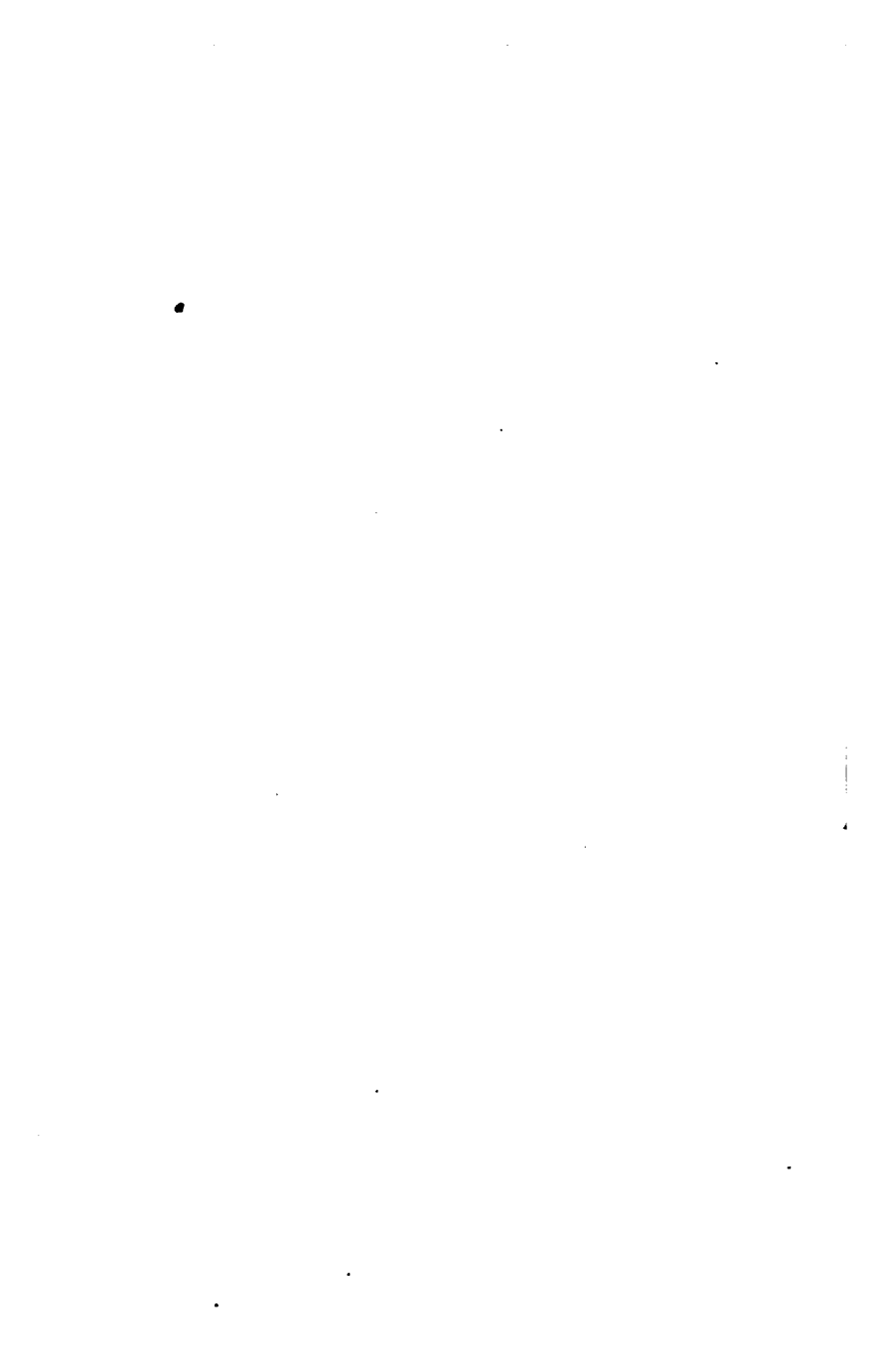


Illustration. On a trial for murder, the prosecution offers the answers made by the now accused when he testified as a witness before the coroner, being under suspicion but not arrested, and the answers made by him afterwards when arrested and examined before a magistrate for committal; both of these ought to be admissible, but some Courts would exclude the latter if made on oath, or if made without receiving a caution as to his privilege; some Courts would exclude the former if made without receiving a caution.

721 ART. 7. *Terminating the Inducement.* If an improper inducement (threat or promise) appears to have been given, a confession made thereafter is inadmissible, unless the influence of the inducement upon the accused appears to have been negated in the meantime. — (W. §§ 853-855.)

Illustration. After a promise by the chief of police to release an accused if he confesses and discloses the principal offender, the prosecuting attorney warns the accused that no promises will avail to release him; a confession made before this warning is inadmissible, but one made afterwards is admissible.

722 ART. 8. *Confirmation by Discovered Facts.* If, in consequence of a confession which is otherwise inadmissible, search is made and circumstances are discovered which confirm its correctness in material points,

(1) [the confession becomes admissible.]¹

(2) [the part of the confession thus confirmed becomes admissible.]²

(3) [the confession itself does not become admissible, but the discovery of the facts in consequence of the confession is admissible.]³ — (W. §§ 856-859.)

Illustration. On a trial for murder by stabbing, the defendant's confession was made after improper promises, but a search made in the place named revealed the deceased's body buried as described in the confession; the whole confession should be admissible.

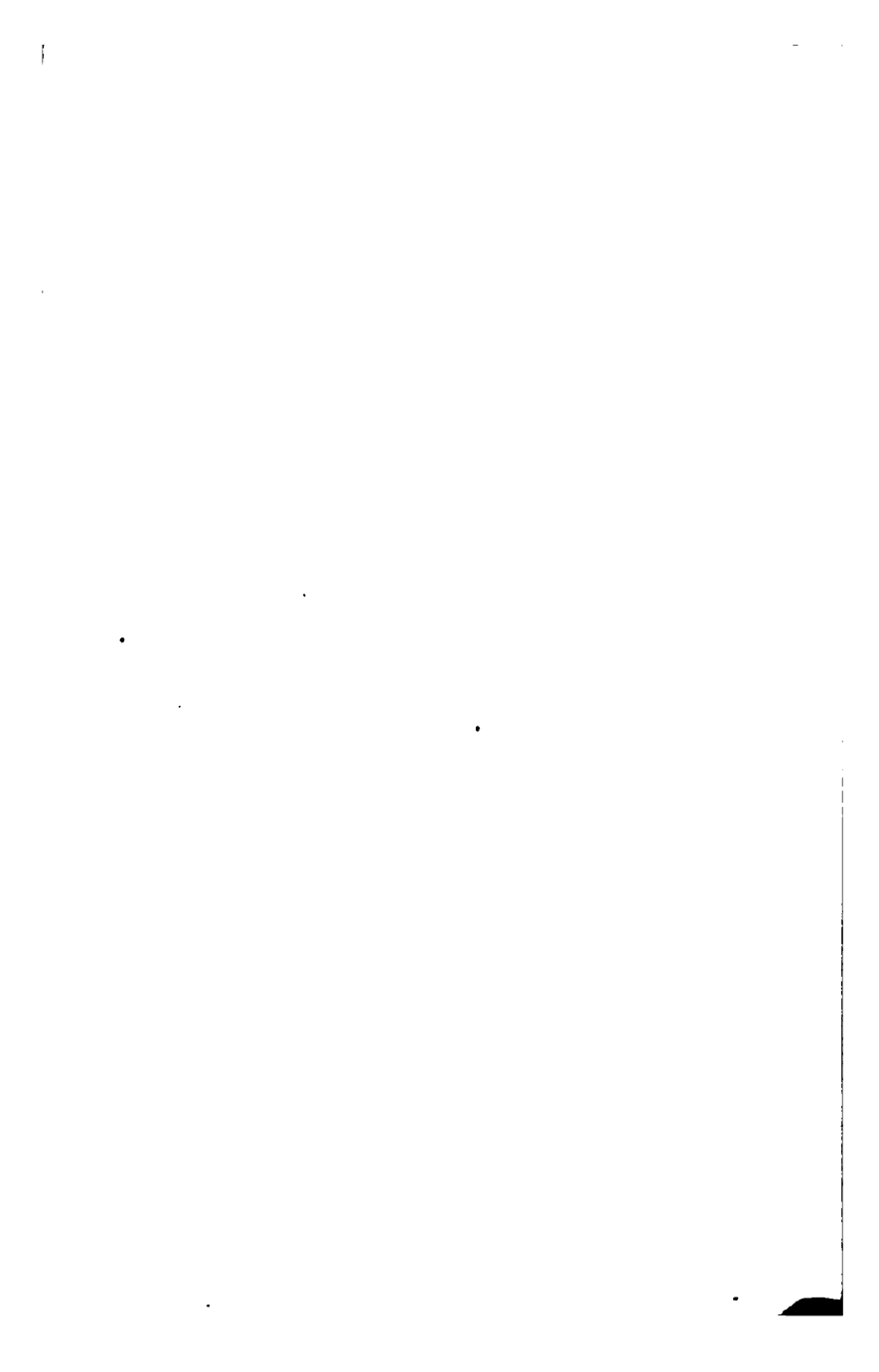
723 ART. 9. *Burden of Proof.* A confession is

(1) [admissible, unless it appears to have been made under improper inducement.]

¹ This is the law in a few States, and is the only sound rule

² This is the law in many States.

³ This is the rule in a majority of States.



(2) [inadmissible, unless it appears to have been made without improper inducement.]¹ — (W. § 860.)

ART. 10. *Judge and Jury.* The admissibility of a confession is determined by the judge, who applies the foregoing rules, pursuant to Rule 229, Art. 1 (*post*, § 2101.) — (W. § 861.)

725 *Par. (a).* When a confession has been admitted, the jury may in their deliberations reject it

(1) [if they regard it as not trustworthy.]

(2) [if they regard it as obtained by improper inducement under the foregoing rules of law.]²

726 *Par. (b).* The judge must hear evidence, if offered, on the preliminary question of admissibility.

727 *Par. (c).* The jury may afterwards hear this and other evidence affecting the trustworthiness of the confession, if it is admitted.

728 [*Par. (d).* The trial judge's determination of admissibility is final, under Rule 18 (*ante*, § 52.)]³

TITLE III:

AUTOPTIC PREFERENCE (REAL EVIDENCE)

730 RULE 123. *General Principle.* Wherever the existence or the external quality or condition of a person or thing is material or relevant to the issue, the third source of evidence (Rule 24, *ante*, § 105), namely, the inspection of the person or thing itself, by production before the tribunal, by experimentation, or by visit of the tribunal, is admissible, subject to any specific exception to the contrary. — (W. §§ 1150-1152.)

Distinctions. Inspection, as a source of evidence, may be forbidden by some *independent* rule of evidence equally applicable here (W. §§ 1154-1156); namely:

¹ The first bracketed clause is the sound rule; but a majority of Courts accept the second one.

² Many Courts accept the second bracketed clause; but the first is the only sound one.

³ Many Courts profess this; few observe it.

(1) By some rule of *relevancy* of circumstantial evidence.

Illustration. The features of a child, resembling the defendant in a bastardy case, may not be admissible as evidence of paternity, under Rule 41 (*ante*, § 209); hence they could not be evidenced by inspection of the Court, any more than by testimony.

(2) By some rule of *privilege*.

Illustration. In a criminal case, the defendant may be privileged from compulsory self-crimination under Rule 203 (*post*, § 1737) by placing his foot in a mould to discover its shape; hence, the privilege applies equally to such compulsory disclosure for the tribunal's inspection; so also in a civil case, for the plaintiff in personal injury claims (Rule 201, *post*, § 1702).

731 ART. 1. *Unfair Prejudice.* An exhibition to the jury of weapons, wounds, or other things calculated to excite emotional prejudice and overcome the reasoning powers, unfavorably to the party in a criminal or a civil case, may be forbidden by the Court in the circumstances of the case.¹ — (W. §§ 1157, 1158.)

ART. 2. *Indecency, Impropriety, Inconvenience.* An exhibition, inspection, or experiment, may in the circumstances of the case be forbidden when not relatively important for ascertaining the truth, — (W. §§ 1159-1161.)

732 *Par. (a)* if it would otherwise be inadmissible under Rule 195 (*post*, § 1652) as being *indecent* or *improper*;

733 *Par. (b)* if it would cause *inconvenience* in the trial.

Illustrations. Exhibiting the naked person; bringing in a bulky machine.

734 ART. 3. *View by Jury.* When the object to be inspected cannot be conveniently produced in Court, the jury may be taken to the place and there view it; — (W. § 1162.) subject to the following details and qualifications:

Cross-references. For inspection regarded as subject to the party's *privilege to refuse*, see Rule 201 (*post*, § 1702) and Rule 203 (*post*, § 1737).

¹ But this prohibition is rarely made.



735 *Par. (a).* The issue may be a [*criminal* or a] civil one.¹ — (W. § 1163.)

736 *Par. (b).* The inspection may be of a *place*, [a *person*, or a *chattel*, or of an *experiment* therewith.]² — (W. § 1163.)

737 *Par. (c).* The desirability of a view is determined by the trial Court in the circumstances of the case.³ — (W. § 1164.)

738 *Par. (d).* The inspection must be made by all the jurors, going together, as directed by the Court. — (W. §§ 1165, 1166.)

Cross-references. The Hearsay rule forbids the reception of evidence at a view, otherwise than by the jurors' inspection; thus arise questions as to the *listening to witnesses*, the pointing out by *official showings*, and the *accused's presence*, under Rule 156 (*post*, § 1266).

739 *Par. (e).* The information obtained by the jurors by their inspection is evidence, *i. e.* a lawful source of belief;⁴ and the impracticability of transmitting it to the court of appeal in the record does not prevent their use of such information. — (W. § 1168.)

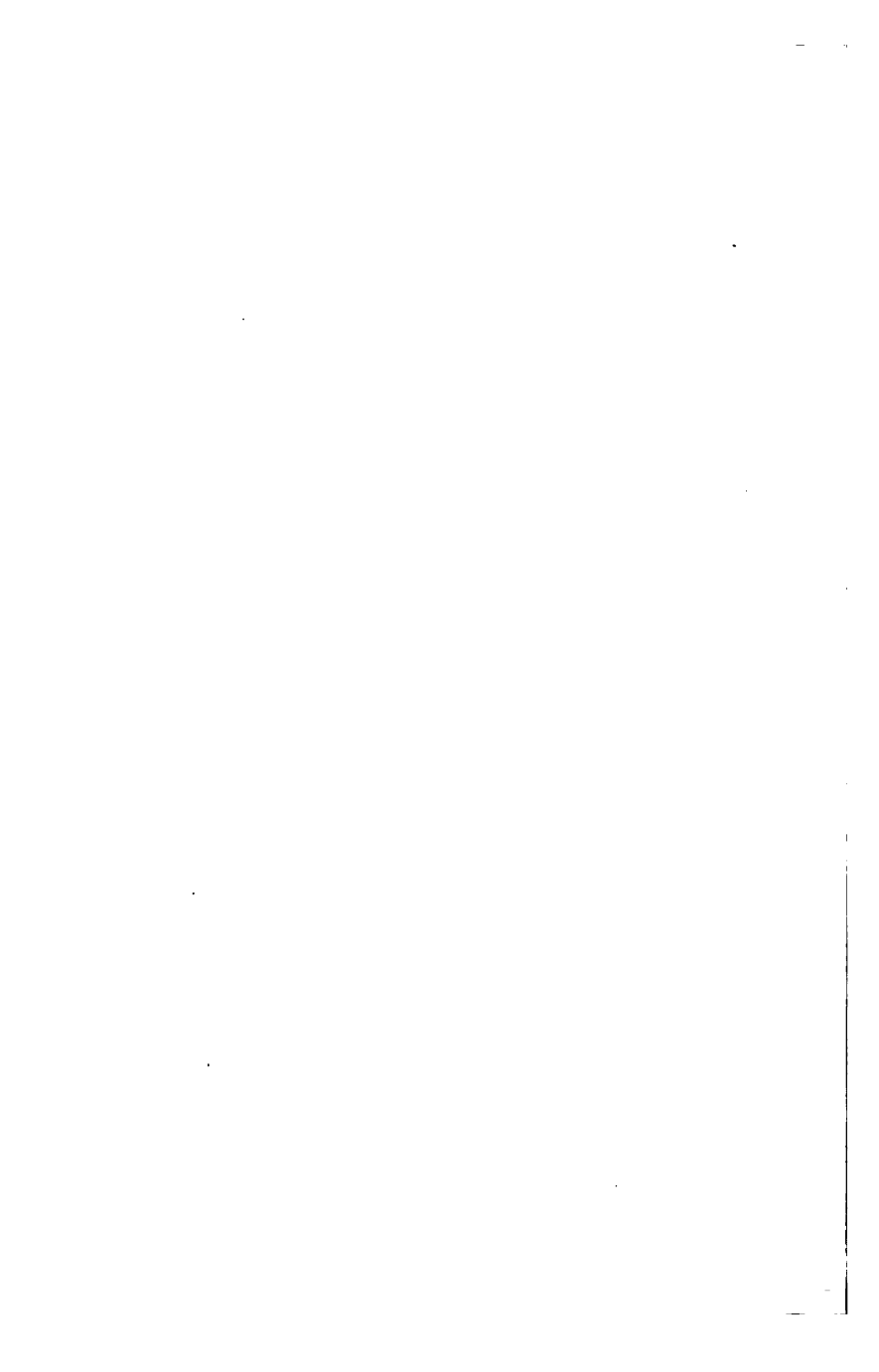
740 [ART. 3. *View by Expert.* The judge may order an inspection by an expert witness, as provided in Rule 224, Art. 1 (*post*, § 1992).]

¹ Some Courts reject the bracketed clause.

² A few Courts incline to limit views to places.

³ Under Rule 18 (*ante*, § 49; trial Court's discretion).

⁴ Some Courts are *contra*; but the question is chiefly a quibble over definitions.



PART II:

RULES OF AUXILIARY PROBATIVE POLICY

RULE 125. *Definition and Classification.* All evidence, 745 though relevant under the foregoing rules, may be further subjected to rules of auxiliary probative policy, *i. e.* rules based on experience of the special dangers or weaknesses of untrustworthiness in specific classes of evidence, and designed to strengthen the weaknesses, avoid the dangers, and provide desirable safeguards. — (W. §§ 1171, 1172.)

These rules are classified as follows:

I. *Preferential Rules*; which operate by requiring one class of evidence to be used in preference to another, either absolutely, or conditionally on its being procurable.

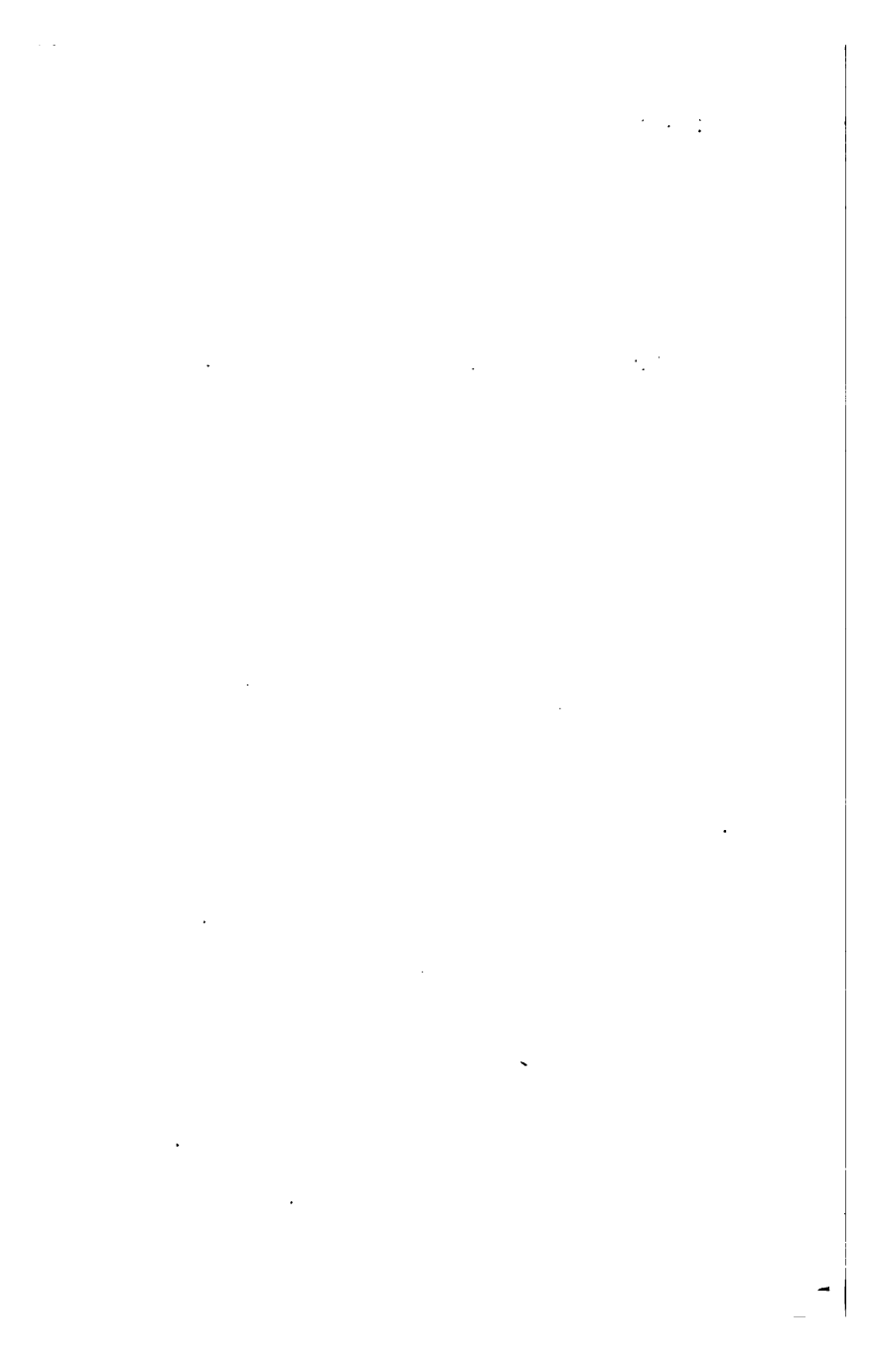
II. *Analytic* (or *Scrutinative*) *Rules*; which operate by applying tests calculated to expose possible weaknesses which might otherwise remain undiscovered.

III. *Prophylactic Rules*; which operate by using expedients calculated to remove some danger or weakness before the evidence is admitted.

IV. *Simplificative Rules*; which operate by eliminating evidence likely to confuse the general process of investigation.

V. *Quantitative* (or *Synthetic*) *Rules*; which operate by requiring certain kinds of evidence to be associated with other evidence before the whole case is allowed to go to the jury.

ART. 1. *Best Evidence Rule.* There is no general rule 746 that the best evidence must be introduced, or that better evidence must be introduced before inferior evidence; there are only certain special rules as to special classes of evidence, as enumerated hereafter. — (W. §§ 1173, 1174.)



TITLE I: PREFERENTIAL RULES

SUB-TITLE I: PRODUCTION OF DOCUMENTARY EVIDENCE

747 **RULE 126. General Principle.** (A) In proving a writing, (B) production must be made, (C) unless it is not feasible, (D) of the original writing itself, (E) whenever the purpose is to establish its terms. — (W. § 1178.)

(Reason and Policy. The policy of the rule is based on the risk of errors, wilful or inadvertent, in a witness testifying by copy or by recollection, and on the relative importance of even slight errors in words and phrases of writings, which usually by their tenor affect decisively the rights of the parties and the facts of the case.) — (W. §§ 1179, 1180.)

ART. 1. “(A) IN PROVING A WRITING;” Rule not applicable to Chattels. The rule does not apply

748 *Par. (a) to chattels uninscribed* [[except in special circumstances]];¹ — (W. § 1181.)

749 *Par. (b) to chattels inscribed*, unless the inscription affects the rights of the parties or is important as evidence;² — (W. § 1182.)

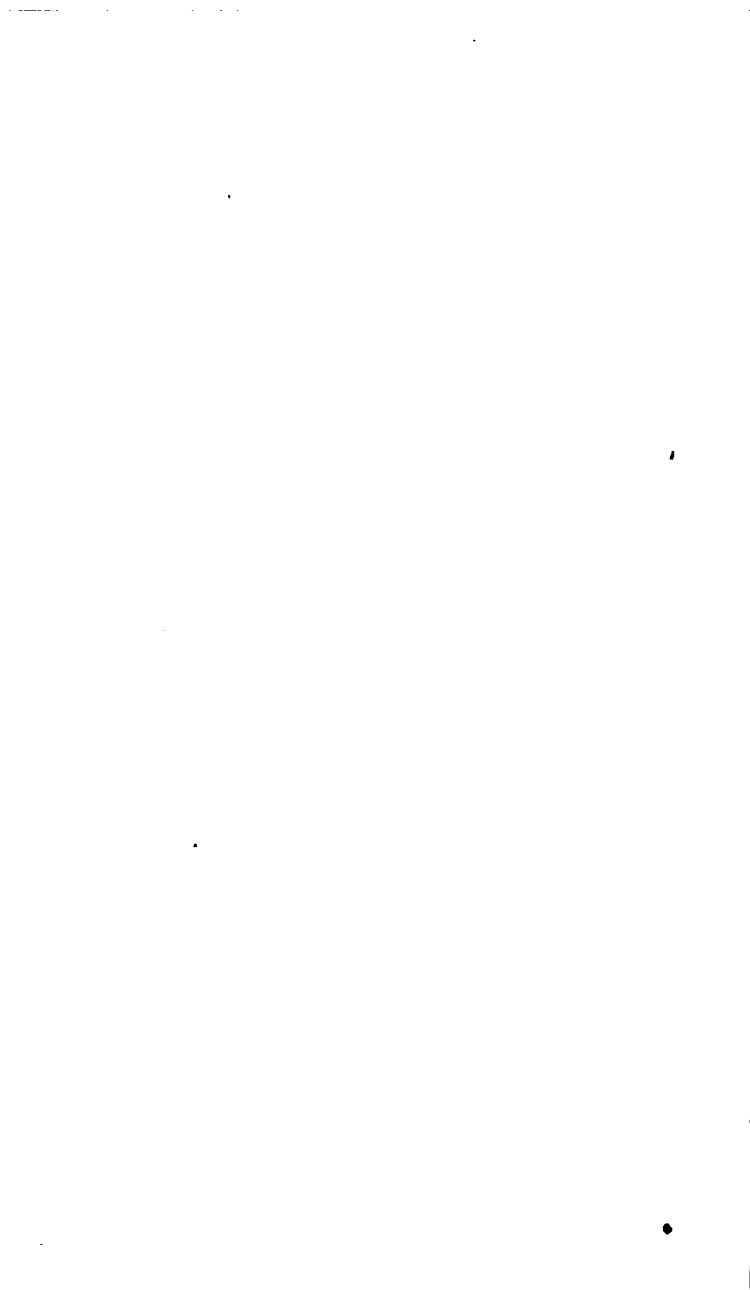
Illustrations. A baggage-check, an express-label, a policeman's star, might thus come under the rule.

750 *Par. (c)* but the rule applies to all writings, *i. e.* materials bearing words and existing as such solely for the sake of the inscription. — (W. § 1183.)

751 **ART. 2. “(B) PRODUCTION MUST BE MADE;” Rules concerning Production.** The rule requires that the writing be brought into court and offered to the tribunal for inspection. — (W. § 1185.)

¹ The double-bracketed clause is not law; but it ought to be.

² No Court has phrased the rule in any form of wide acceptance; the above represents good sense and most of the cases.



752 *Par. (a).* The writing need not be *read* aloud, unless the Court so requires.

753 *Par. (b).* The writing need not be perused by or *shown* to a witness, except as required by other rules of evidence.

Cross-references. This requirement may be made

(1) under Rule 87 (*ante*, § 418), where a witness *identifying a signature* may have to look at the document;

(2) under Rule 127 (*post*, § 812), where a witness who is to be *contradicted by his own writing* may have the document first shown to him.

754 *Par. (c).* The production of the original is *always allowable*, even when a copy is admissible under the ensuing Rules; unless prohibited by some rule of privilege (Rules 200-212) or by some policy (Rule 196) requiring public records not to be removed from the place of custody. — (W. § 1186.)

755 *Par. (d).* Even when the original is produced, a *copy* also may be introduced, if evidentially useful. — (W. §§ 1190, 1229.)

Illustration. A copy of an illegible deed; or a photograph of a disputed signature under Rule 93 (*ante*, § 484).

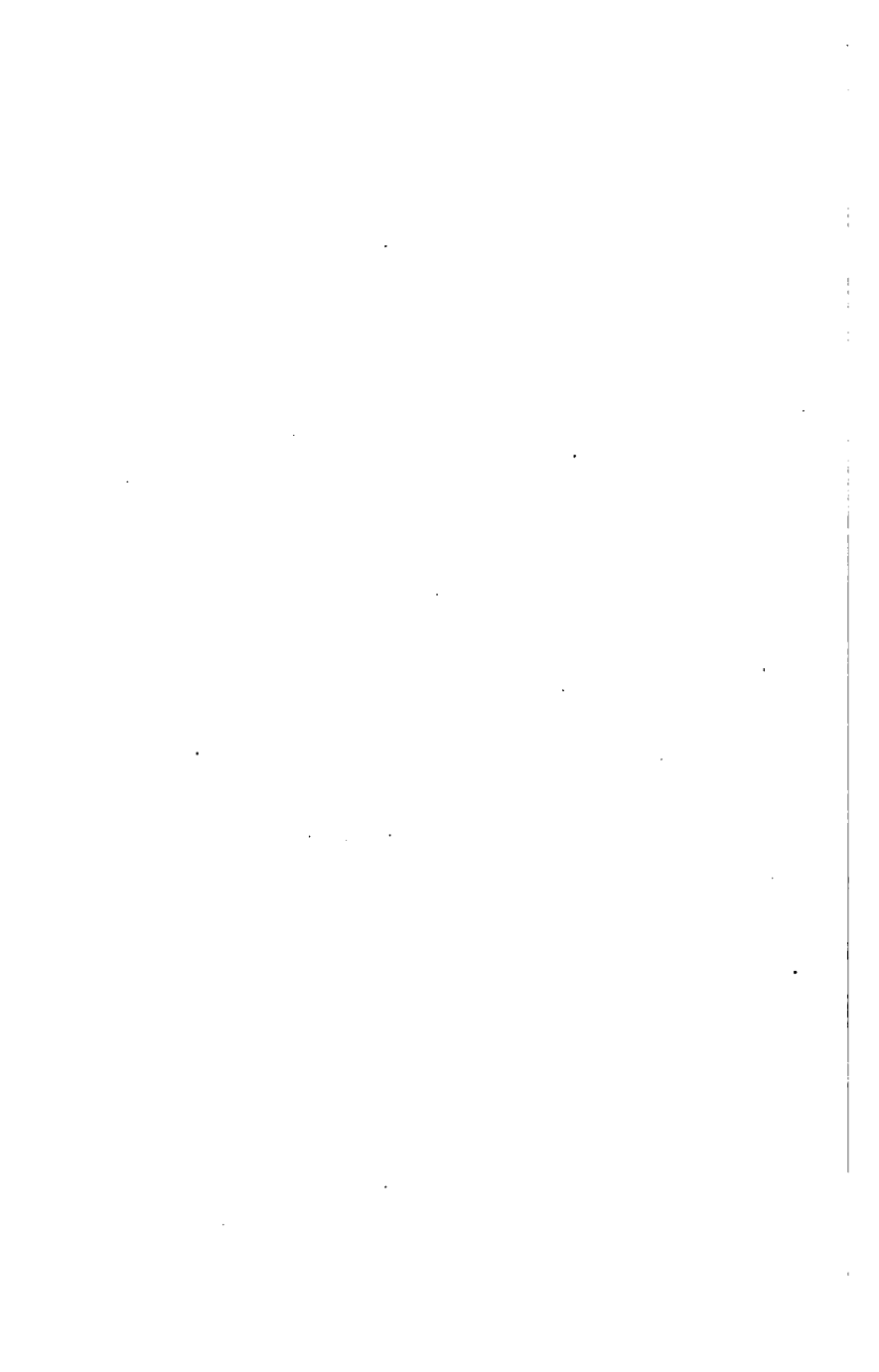
756 ART. 3. “(C) UNLESS IT IS NOT FEASIBLE;” *General Principle.* The production of the original writing may be dispensed with where it is not feasible;¹ — (W. § 1192.)

subject to the details and qualifications of Arts 4-12 following:

757 *Par. (a).* The production of the original is not dispensed with merely because its *genuineness* is not in dispute. — (W. § 1187.)

758 *Par. (b).* Where production is dispensed with by reason of loss or some other ensuing excuse, the *order of evidence* as to the *loss*, the *contents*, and the *execution* of the writing

¹ No Court lays down this broad rule yet, except in the “best evidence” formula.



depends upon the circumstances of each case.¹ — (W. § 1189.)

Illustration. Action on a policy of insurance; plea, no policy executed. The plaintiff may first show the loss of an instrument purporting to be a policy, then prove the terms of that instrument by a copy, and then introduce his evidence of its execution; but if the real dispute was as to the terms, not the execution, his evidence of execution should come second, and then his alleged copy.

ART. 4. *Same:* (1) *Loss or Destruction.* The production
759 of the original is dispensed with where the party is unable
to produce it because it is destroyed or lost. — (W. § 1193.)

760 *Par. (a).* In evidencing loss or destruction the *suffi-*
ciency of the evidence depends on the circumstances of
each case.² — (W. § 1194.)

761 *Par. (b).* In particular, [no fixed rule requires that] the
latest known custodian shall testify, or [that] the latest
known place of deposit shall be searched.³ — (W. § 1195.)

762 *Par. (c).* The *replies* made to a searcher are [not] ad-
missible as circumstantial evidence of inability to find.⁴ —
(W. § 1196.)

763 *Par. (d).* Even the *offering party's own intentional*
destruction of the original [dispenses him from producing it,
provided the circumstances negative a fraudulent intent
to suppress the truth.]⁵ — (W. § 1198.)

Illustration. In an action on a contract, the party offers a copy of a telegram received by him; if he has destroyed the original before controversy arose as a matter of routine in disposing of old papers, the copy is admissible; otherwise, if it appears that he destroyed it after request for inspection by the other party and refusal to allow inspection.

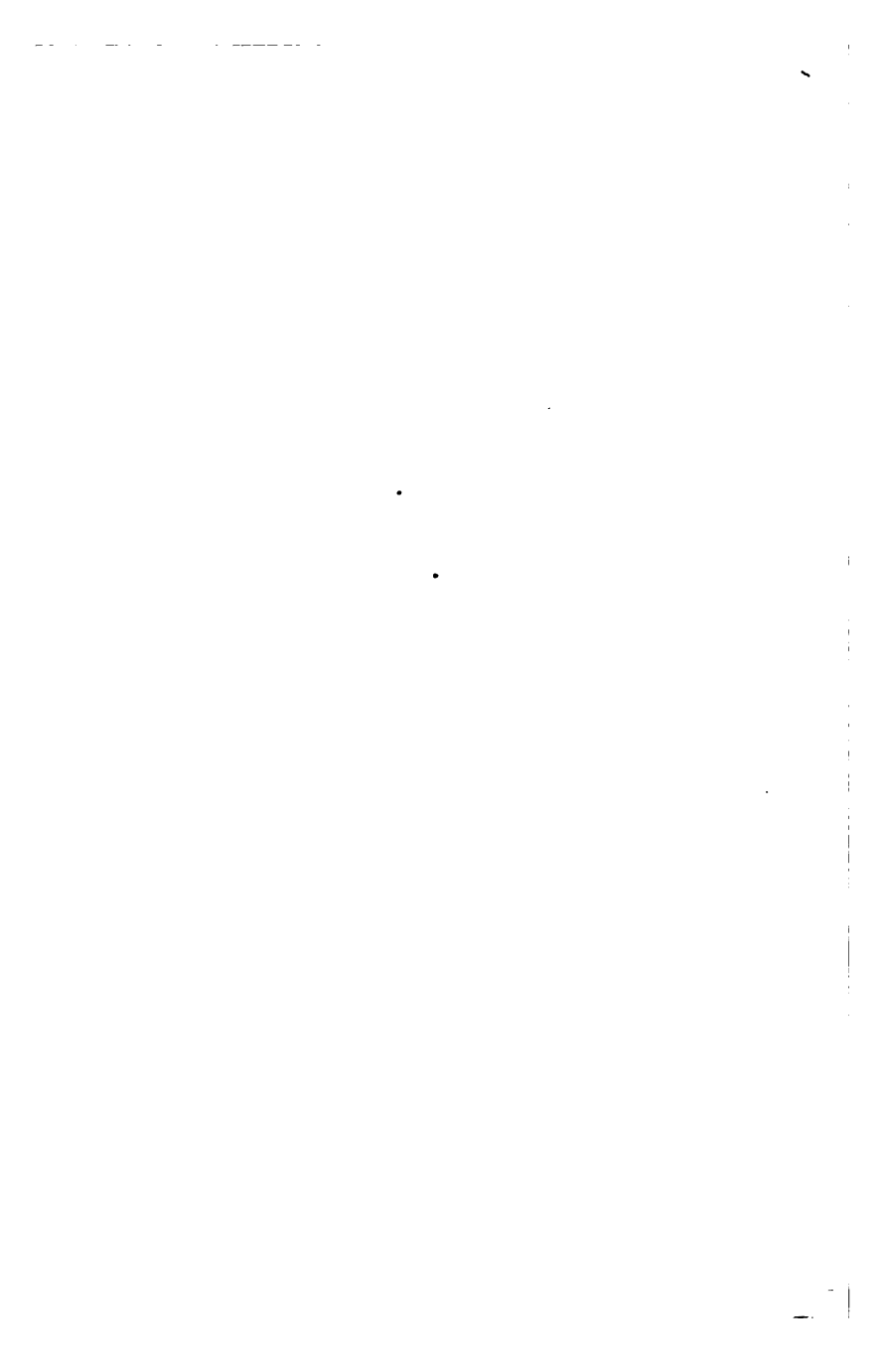
¹ Some Courts lay down fixed rules; but they are impracticable.

² This is therefore for the trial Court's discretion (Rule 18, *ante*, § 49).

³ But some Courts have the affirmative rule.

⁴ Some Courts use the bracket.

⁵ A few Courts are over-strict; other Courts differ in their phrasing.



Distinguish the question of substantive law whether the grantee's destruction of a deed *reverts title* in the grantor.

764 ART. 5. *Same*: (2) *Detention by Opponent*. The production of the original is dispensed with where the party is unable to produce it because it is detained by the opponent; *i. e.* where

it is in the opponent's possession or control, and
he has been requested by notice to produce it at the trial,
and
he has failed to produce it. — (W. § 1199.)

765 *Par. (a)*. The opponent is in *control* of the document, even where it is in the hands of a third person, within or without the jurisdiction, provided it is still subject to the opponent's right to resume its custody. — (W. § 1200.)

Illustration. A bill in the hands of an attorney, or a deed in custody of a real estate agent, might thus be in the party's control; but perhaps not a note placed in the hands of a bank for collection.

766 *Par. (b)*. The opponent's *possession* must be *evidenced* by the party desiring to prove the document; but it may be evidenced in any ordinary mode, in particular, by the course of the mails, pursuant to Rule 36 (*ante*, § 131). — (W. § 1201.)

Distinguish the question whether the opponent's *attorney* is *privileged* not to testify to possession under Rule 205 (*post*, § 1783).

767 *Par. (c)*. The request or *notice to the opponent* must be made wherever the party is relying on the opponent's detention as the excuse for non-production. — (W. §§ 1202, 1203.)

Illustration. In proving the contents of a letter mailed to the opponent, the opponent admits receiving it; here a notice is necessary; but if he denies receiving it, the letter is virtually lost, and no notice is needed.

768 *Par. (d)*. The notice to the opponent must be given *expressly in writing*;

except that the pleadings may suffice to give *implied notice* that the document will be needed. — (W. § 1205.)

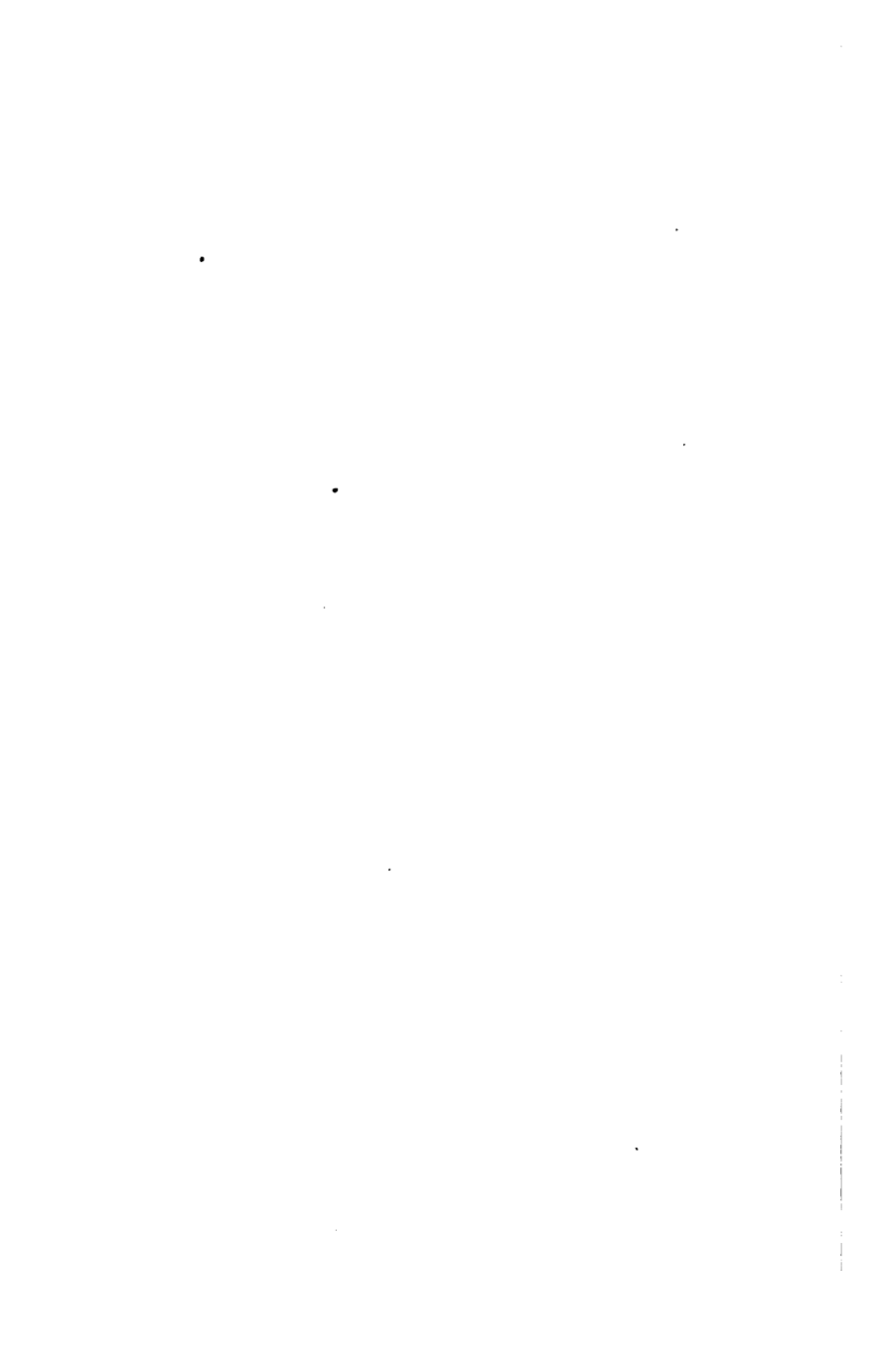


Illustration. In trover for a deed, ejectment for land claimed under a grant named, or contract based on an account stated, the pleadings may suffice as an implied notice.

769 *Par. (e).* The notice

(1) must be given at a *time* before trial sufficient for finding and bringing the document;

(2) must be given to the *opponent* or his *attorney*;

(3) and must *describe* the document sufficiently to identify it.¹ — (W. § 1208.)

770 *Par. (f).* The notice may be given *orally at the trial*, if the document is there in the opponent's control. — (W. § 1204.)

771 *Par. (g).* The rule for notice is [not] applicable when the desired document is *itself a notice*; except when it is a notice to produce under the present rule.² — (W. § 1206.)

772 *Par. (h).* The opponent's *failure to produce* a document for which the foregoing rules have been satisfied permits the first party to evidence it otherwise, no matter what the ground for the failure to produce. — (W. § 1209.)

773 *Par. (i).* The opponent who thus *fails to produce* is not allowed afterwards to produce it for the purpose of disputing the first party's evidence of its tenor.

Cross-references. Compare also the rules

(1) that the jury may *infer from his conduct* the tenor of the document (Rule 118, Art. 6, *ante*, § 662),

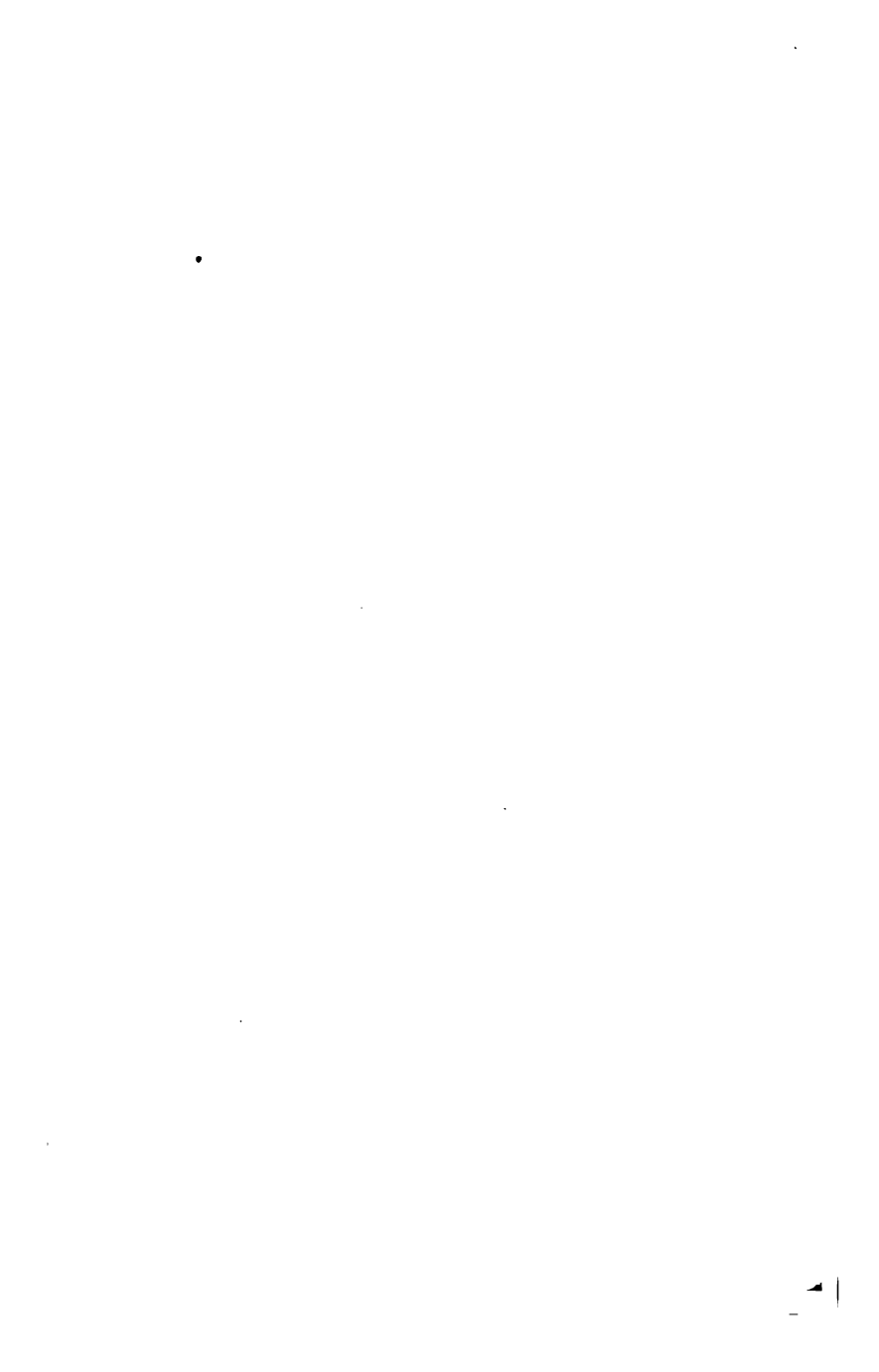
(2) that the party may be defaulted for *refusing* to give an opportunity of *inspection before trial* (Rule 161, Art. 4, *post*, § 1335).

774 ART. 6. *Same:* (3) *Detention by Third Person.* The production of the original is dispensed with where the party is unable to produce it because it is detained by a third person not subject to his control. — (W. § 1211.)

775 *Par. (a).* If the third person is *within the jurisdiction*,

¹ There is some variance of ruling as to Clause (2). The whole matter is one for the trial Court's determination.

² The decisions are not harmonious.



ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED
DATE 11-14-01 BY 60322 UCBAW

~~ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED~~

~~ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED~~
~~DATE 08-19-2007 BY SP-6 BJS/BJS~~

~~CONFIDENTIAL~~

... The production of ... a judicial record ... part of the ... the same case in the ...

THE PROSECUTION IS DISCLOSED THAT WHERE IT IS DISCLOSED
IN THE "RECORD" IS A FURTHER DISCLOSURE. — W. 1218—

~~SECRET - NOFORN~~ ~~ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED EXCEPT WHERE SHOWN OTHERWISE BY THE FOLLOWING DATE AND AUTHORITY~~

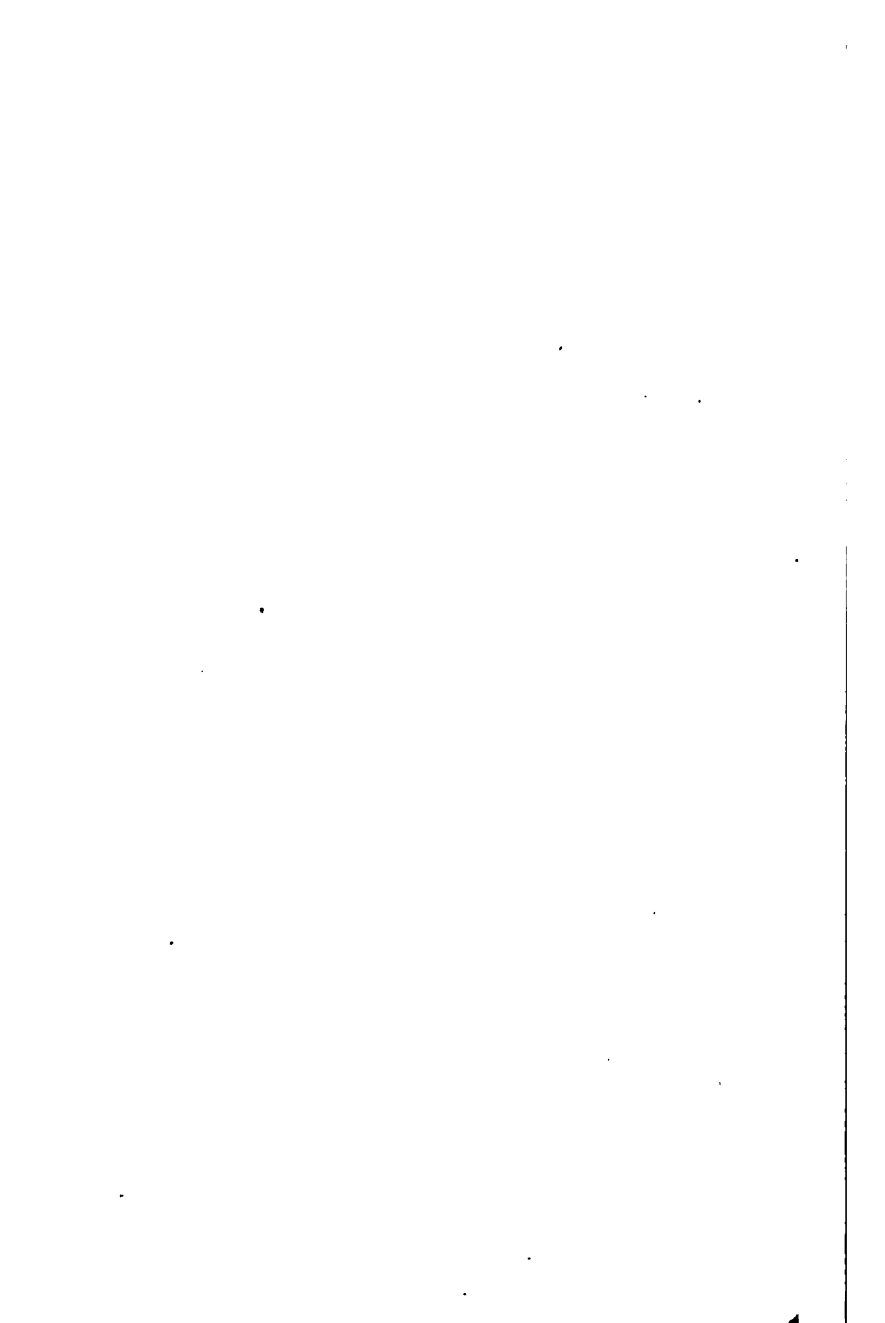
of production of the original may be dispensed with wherever
is a genuine document of such frequent utility in litigation

2. Some numbers are covered by the bracketed clause.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

document is being out of the jurisdiction suffices. It is essential matter for the trial Court's determination.

exceptions. Statutes usually cover the general rule. Above general rule statutes of classes of documents, but the application of it under Rule 18 (*ante*, § 49).



that its repeated production would cause unreasonable inconvenience to the owners or users of it.]¹ — (W. § 1223.)

Illustrations. Bank-records, church-registers, title-abstracts, and perhaps records of public-service corporations.

Cross-reference. For the ordering of an inspection of such a document before trial by an *expert witness*, see Rule 123 (*ante*, § 740).

For such inspection by a *party-opponent*, see Rule 161, Art. 4 (*post*, § 1335).

ART. 11. *Same:* (8) *Recorded Conveyances.* The production of the original is dispensed with where it is a document of grant or authority recorded pursuant to law in a public office;² — (W. §§ 1224-1227.)

(1) [provided the original is not within the offeror's control.]³

(2) [provided neither the offeror nor the opponent is the grantee named in the document.]⁴

Cross-references. (1) For the rule as to *government grants*, depending on which is the original, see Rule 128 (*post*, § 791).

(2) For the rule as to admitting a *certified copy*, under the exception to the hearsay rule, see Rule 148 C (*post*, § 1161).

(3) For the rule admitting *abstracts* of burnt records of deeds, see Rules 150, 184 (*post*, §§ 1183, 1565).

ART. 12. *Same:* (9) *Voluminous Documents.* Where a fact to be evidenced by documents would require an inspection of numerous documents made up of multifarious details, so as to make inspection or reading of all the details at the trial unreasonable, other evidence, summarizing the contents, may be introduced; provided that the trial Court may in the circumstances require the originals to be made accessible to the Court and the opponent for inspection and may require

¹ There are specific rulings and statutes on such documents, but no general rule in this broad form.

² The majority of Courts now follow this rule, by common law or by statute, without either of the provisos. A few do not recognize at all a special exemption for recorded conveyances.

³ Several Courts follow this proviso, under statute; the phrasings differ slightly.

⁴ This proviso is peculiar to the New England Courts, with slight local variations.



the reading or production of particular portions. — (W. § 1230.)

Illustrations. Pecuniary accounts; copyright infringement; corporate records.

ART. 13. "(D) OF THE ORIGINAL WRITING ITSELF." *What is*
783 *the original.* The rule requires the production of the specific document (the "original") whose contents are to be proved in the state of the substantive law and the pleadings; and it does not matter whether the document so desired was written before or after (*i. e.* a "copy") some other document. — (W. § 1231.)

In determining what is the original so desired, the following further details apply:

ART. 14. *Same:* (1) *Duplicates and Counterparts.* Where
784 the document came into existence in duplicate or multiply, any one of these may be introduced, without accounting for the non-production of another;

and all must be accounted for before other evidence is admissible. — (W. §§ 1232, 1233.)

This rule includes

Par. (a). A document of a *bilateral transaction* executed
785 by the parties in duplicate; — (W. § 1232.)

Illustration. A counterpart-lease or an indenture.

Par. (b). A unilateral *notice* written twice at one
786 sitting;¹ — (W. § 1234.)

Par. (c). Multiply impressions from a *printing-press*
787 with a single unaltered type-setting;

except so far as one particular sheet becomes the original by virtue of Art. 15 (*post*, § 790) or of Art. 16 (*post*, § 791); — (W. § 1234.)

[*Par. (d).* Multiply impressions from a *typewriter*,
788 *manifolder*, or other machine, in so far as the circumstances show identity of impression;]² — (W. § 1234.)

¹ This is law, but is not sound.

² This is probably not yet law, but it seems practical.



789 *Par. (e).* But not a *blotter-press* copy. — (W. § 1234.)

ART. 15. *Same:* (2) *Copy Acted on or Dealt with as Original.*

790 Where an act material or relevant consists partly in acting on or otherwise dealing with a document so as to make the terms of the document a part of the act, the production of that document is required. — (W. § 1235.)

Illustrations. In an action on an account stated, the document sent to the debtor, even though it is made by copying the account books, is the original to be produced, because the debtor's assent to the account therein stated is the basis of the claim.

ART. 16. *Same:* (3) *Copy made Original by Substantive*

791 *Law.* Where two or more documents were made by copying one from the other, either may become the original required to be produced, if it is the specific document material under the rule of substantive law applicable to the case. — (W. §§ 1236-1240.)

Illustrations. (1) The plaintiff, in an action on a contract made by telegram desires to prove the making of the contract by telegram. Whether the telegram-sheet delivered to the defendant must be produced depends on whether the substantive law declares the contract to have been made by that sheet or by the one handed to the operator by the offeror.

(2) In an action against a reporter for a *libel* published in a newspaper, a number of that issue of the newspaper is the original for proving publication; but in an action by the reporter for salary earned by writing the article, the manuscript is the original for proving performance.

(3) In a *land-grant* by the State or Federal Government, in substantive law the effective document of grant may be the document given to the grantee or the document retained as part of the Government records; thus, whether a patent, scrip, location, certificate, *testimonio*, *expediente*, or other such document is the one required to be produced depends on the principle of the land-law.

(4) Similar questions arise for *ballots*, *tax-lists*, *notary's protests*, and a variety of other documents.

ART. 17. *Same:* (4) *Exclusive Memorials under the Parol*

792 *Evidence Rule.* Whenever by the parol-evidence rule (Rule 217, *post*, § 1920) a particular document has become the exclusive memorial of the transaction, superseding other writings,



that document is the one required to be produced, in proving the transaction. — (W. § 1241.)

Cross-reference. For the *burden of proof* as to producing the writing in such a case, see Rule 217, Art. 7, (*post*, § 1941).

ART. 18. “(E) WHENEVER THE PURPOSE IS TO ESTABLISH
793 ITS TERMS.” *General Principle.* In pursuance of the reason (*ante*, § 747) of the rule requiring production, it applies only where the purpose of the party, under the issues, is to establish the terms (or contents) of the document, and therefore does not apply when the purpose is merely to prove some other fact relating to the document or some other separate part of a transaction in which the document formed only one part. — (W. § 1242.)

Distinguish the statement that the rule does not apply to a document which is only “collaterally in issue”; this phrase is often applied to express the above principle, but correctly it should be applied only to the exception to the rule (*post*, Rule 127, Art. 1, § 806).

ART. 19. *Same: Applications of the Principle.* The foregoing principle applies in the following classes of cases, among others:¹

794 *Par. (a).* The rule does not apply in proving an *oral utterance accompanying* some dealing with a document. — (W. § 1243.)

Illustration. In an action for slander, whose publication consisted in reading aloud to hearers the contents of a letter-draft, the words uttered orally may be proved without producing the document.

Distinguish cases where the oral part of a transaction is invalid under the parol-evidence rule, Rule 217 (*post*, § 1920).

795 *Par. (b).* The rule does not apply in proving a person's *knowledge* or *belief* of the contents or existence of a document. — (W. § 1243.)

Illustration. In proving a purchaser's knowledge or belief as to a prior incumbrance on the land, the document need not be produced.

¹ The rule for trial Court's discretion here applies (Rule 18, *ante*, § 49).

796 *Par. (c).* In stating the *identity* of a document already in the case with one whose contents are otherwise irrelevant,

or the identity of a person or thing with one mentioned in a document whose contents are otherwise irrelevant, the irrelevant document need not be produced, unless its precise terms are essential in the identification. — (W. § 1244.)

Illustration. In an action for non-delivery of a specific lot of cotton, the fact that the agent had given a receipt for thirty-six bales of cotton may be testified to, in identifying the lot, without producing the receipt.

797 *Par. (d).* In proving a *general fact resulting* from written entry or item or series thereof, the writing need not be produced,

unless in the circumstances the precise terms of the writing are involved. — (W. § 1244.)

Illustrations. (1) Whether the yearly sales amounted to eight thousand dollars, would not require production of the books; but whether a bill rendered was for eight dollars, would require production.

(2) Whether a lawsuit was pending, would not require production; but a judgment had been entered, would require production.

(3) That a liquor-license had been granted to M., would require production; but that no entry of a grant of license to M. could be found, would not require production of the entire record.

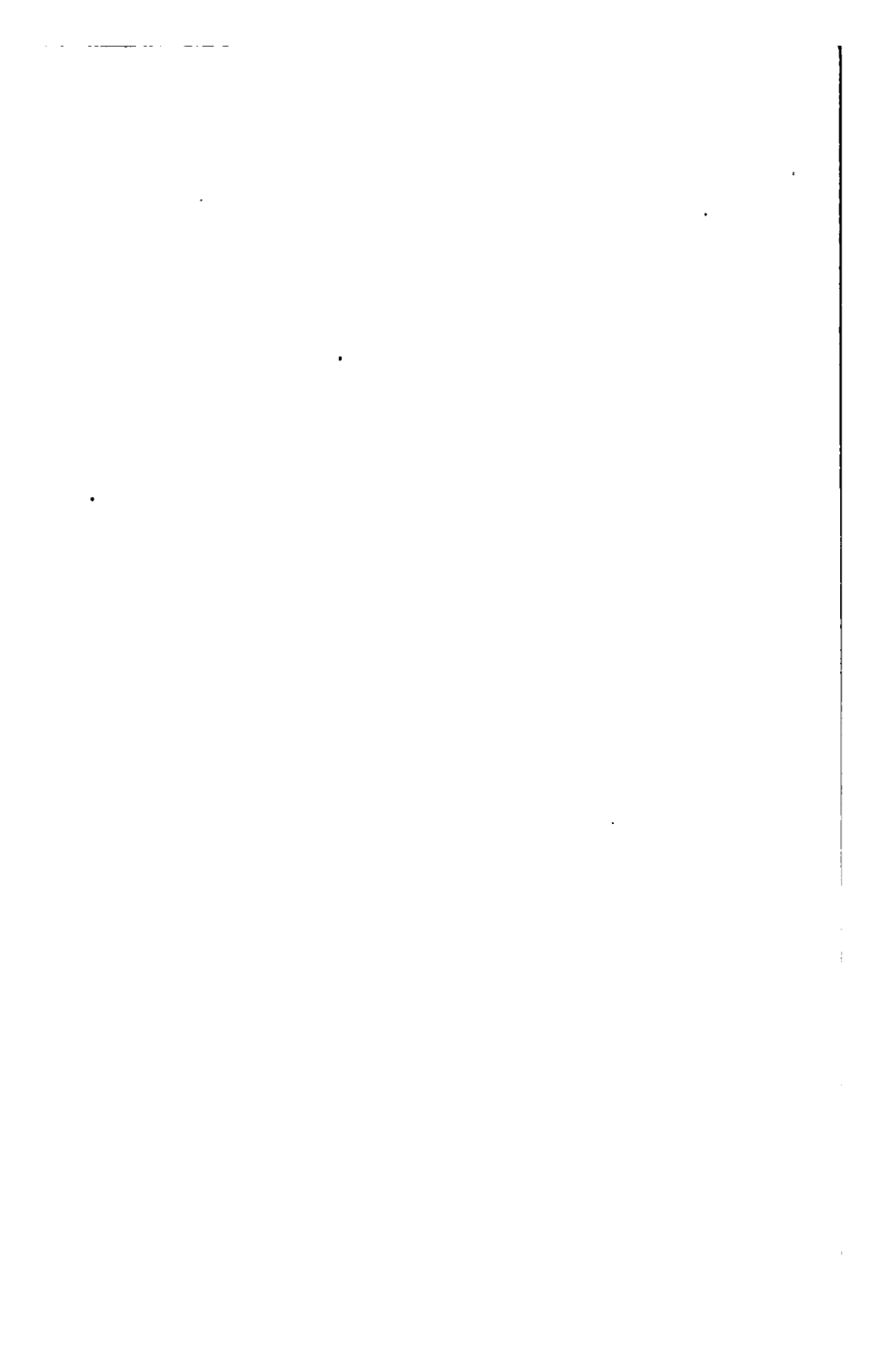
Cross-reference. For the admissibility of a custodian's certificate that no record exists, see Rule 148 C, Art. 6 (*post*, § 1152).

798 *Par. (e).* In proving the act of *payment* in discharge of a written claim, the fact and the amount of payment may be evidenced without production,

unless the terms of a specific document are necessarily involved. — (W. § 1245.)

Illustrations. (1) In an action for money due on a draft the fact of payment may be evidenced without producing the draft; but if the payment was made by check, or if the application of the payment to one or another purpose is disputed and the payment was made by letter stating the purpose, the check or the letter might require to be produced.

(2) Upon payment, a receipt is given; the payment may be evidenced without producing the receipt; except so far



as the parol-evidence rule requires otherwise (Rule 217, *post*, § 1926).

799 *Par. (f).* In proving the fact of *ownership, tenancy, or sale*, the document of title need not be produced, unless in the circumstances its specific terms are material. — (W. §§ 1246, 1247.)

Illustrations. (1) In an action for personal injury on a railroad said to be leased and controlled by the defendant, the document of lease need not be produced; unless, by reason of dispute as to the identity of the lessee, the terms of description in the lease are material.

(2) In an action for mesne profits, an expert witness to land-values, who qualifies by having bought and sold land, need not produce the deeds of sale; but the defendant, justifying as owner and testifying to purchase from M, must produce the deed.

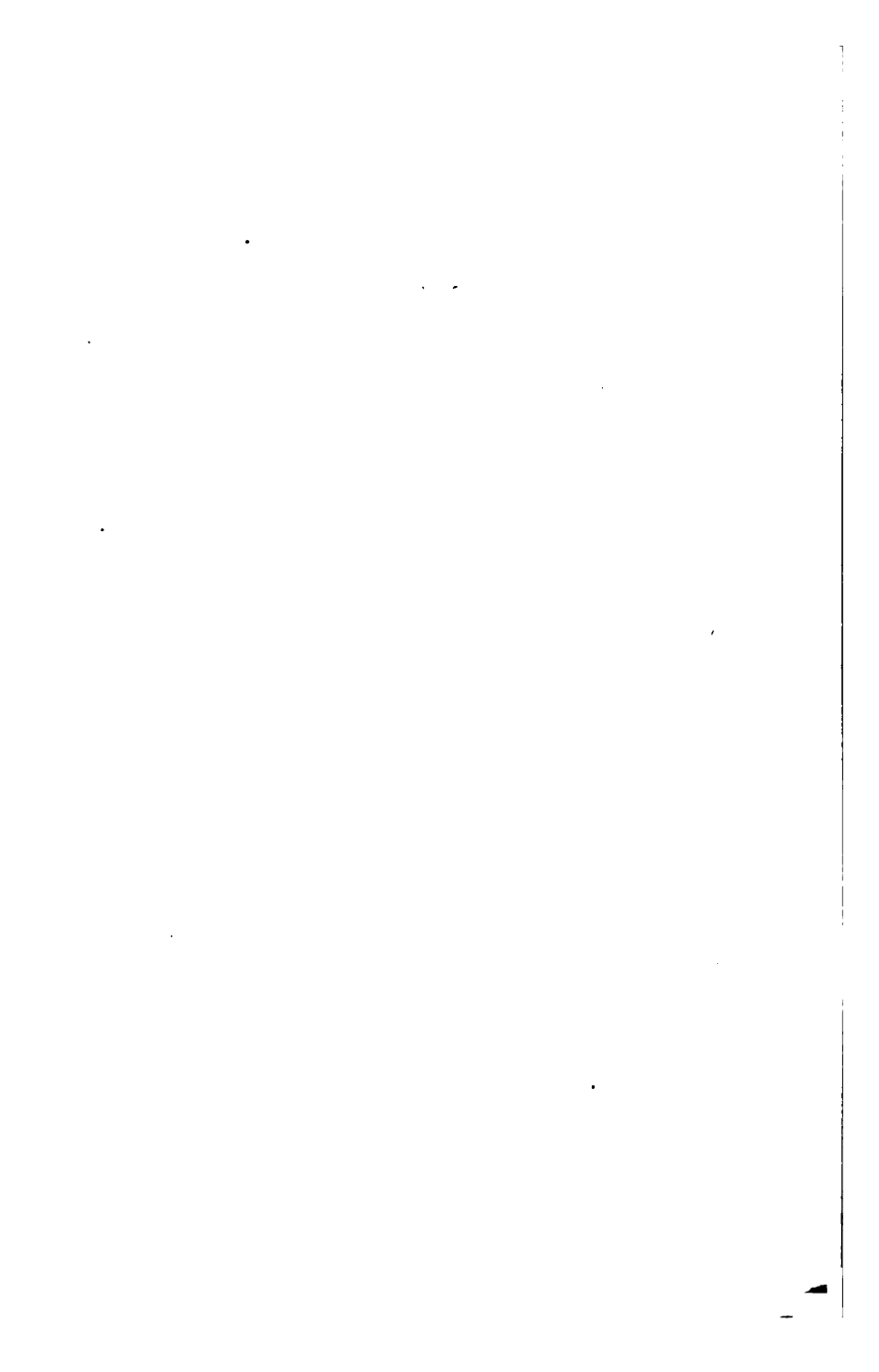
800 *Par. (g).* In proving the fact of *existence, execution, sending, delivery, or publication* of a document, it need not be produced, unless in the circumstances its specific terms are material. — (W. § 1248.)

Illustrations. (1) In an action on a contract made by a partner, testimony to his authority to act, as shown in his frequent prior execution of notes for the firm, may be given without producing those notes.

(2) In an action for goods converted by a consignee, the act of shipment and of taking a bill of lading may be testified to without producing the bill of lading; but in an action against the carrier for misdelivery of the goods contrary to the terms of the bill, the bill must be produced.

801 *Par. (h).* In proving the fact of *conversion, loss, or larceny* of a document, *service* of a writ or notice, *possession* of a deed, or any other conduct dealing with a document, its production is not required, unless in the circumstances its specific terms are material. — (W. §§ 1249, 1250.)

Illustration. In an action for services rendered in serving processes, the writs or summons need not be produced; but in an action for converting a horse, with a justification under a writ of replevin, the writ must be produced in proving the justification.



Distinguish (1) the question whether, in excusing the non-production of a *lost original*, under Art. 4 (*ante*, § 759), the party may prove the loss without first introducing some evidence of contents.

(2) the question whether testimony to the fact of ownership, possession, etc., violates the *opinion* rule (Rule 173, *post*, § 1455).

RULE 127. *Exceptions to the Rule.* The rule requiring
805 production of the original document is subject to the following exceptions, in which cases the original writing need not be produced nor accounted for before any other evidence of its contents is admissible:

[ART. 1. *Documents Collateral to the Issue.* The rule does
806 not include documents whose terms are not material to the main issues of the case nor to any important fact relevant to those issues.]¹ — (W. §§ 1252-1254.)

Illustration. (1) In a prosecution for assault on a constable while acting under a writ, the production of the writ is not required, its contents being immaterial and unimportant; and even if the question arose of a mistake in serving the wrong person, the contents though material and relevant might still be unimportant.

(2) In the same case, in testifying to the assaulted person's status as constable, the record of his appointment to office need not be produced, being ordinarily not material nor important. — (W. §§ 1728, 2535.)

Distinguish the cases arising under the limitation of Arts. 18 and 19 (*ante*, §§ 793-801), which may often lead to the same result; a number of Courts use the present term "collateral" in applying those limitations. But the present exception should exist, apart from those limitations.

ART. 2. *Documents evidenced by Party's Admission of*
807 *Contents.* The rule does not include documents whose contents are evidenced by the party-opponent's admission — (W. §§ 1255-1257.)
provided either

¹ This is law in many States and ought to be extended.

Par. (a). That the admission is made while testifying, on the stand or by deposition; ¹

808 *Par. (b) or,* That the admission is made in a writing; ¹

809 [*Par. (c) or,* That the admission is oral and out of court, if the making of such admission is not *bona fide* disputed by the opponent; ¹]

810 *Par. (d) or,* That the original is lost or otherwise accounted for. ²

Illustrations. (1) In an action on a debt, with a plea of discharge in insolvency, the plaintiff's admission that the defendant had been adjudged on the record a discharge in insolvency would be receivable if made in testifying on the stand, or in a letter; but not if made in conversation before trial, provided the fact of the utterance of such admission was *bona fide* disputed by him.

(2) In an action of ejectment by M against N, a recital, in a deed by M's predecessor, of the contents of a prior deed by him to N's ancestor, is admissible against M.

[(3) In an action of ejectment by R against S, (a) the oral statement of S's grantor that he had in 1859 made a deed to R's ancestor is admissible against S, provided the existence and loss of such a deed is shown under *Par. (d) supra*; (b) but the oral statement of S's grantor that he was only a lessee is not admissible, if S has already shown a purporting title by deeds]. ²

Distinguish (1) the *judicial admission* (Rule 231, *post*, § 2140) which dispenses the party from all evidence on that subject;

(2) the opponent's declaration, claiming or disclaiming title, when offered as a *verbal act* accompanying occupation, in an issue of adverse possession (Rule 155, *post*, § 1245);

(3) a deceased third person's declaration of tenancy only, as a statement of a *fact against interest* (Rule 139, *post*, § 968).

¹ Probably all Courts would concede *Par. (a)*. Most Courts would concede *Par. (b)*. On *Par. (b)* Courts are divided, usually stating the rule of its first clause *pro* or *con*; but if the second clause be added, the objections to the unqualified first clause disappear.

² All Courts would concede this; but it is not a genuine exception, for it assumes the rule of production to be enforced.

³ This illustration exhibits the local New York rule, followed by a few other States.



ART. 3. *Documents affecting a Witness on Voir Dire.*
 811 Where a witness' interest, disqualifying [or impeaching]¹
 him, depends on the terms of a document, it need not be pro-
 duced, unless the party needing it knew of that need before
 trial. — (W. § 1258.)

ART. 4. *Documents admitted by Witness on Cross-Examina-
 tion.* Where the purpose is to impeach a witness by prior
 statements of his in writing, the rule for production applies,
 subject to the following qualifications: — (W. §§ 1259-1263.)

[Par. (a). The writing need not be shown or read to
 812 him before asking him as to its contents].²

Par. (b). But the tenor and circumstances of the sup-
 813 posed statement must be sufficiently specified to him
 orally in a question, pursuant to Rule 108 (*ante*, § 579),

[Par. (c). If he admits, in replying to such question,
 814 that he did make the statement asked about, the writing
 need not be produced by the impeaching party,
 unless the trial Court deems it fair to do so].³

Par. (d). If the witness denies that he made the state-
 815 ment, the impeaching party must produce the writing;⁴
 but before introducing it in impeachment he must evi-
 dence its genuineness in some method, pursuant to Rule
 188 (*post*, § 1591).

[Par. (e). Whether the witness denies or admits the
 816 writing, the party for whom the witness testifies may
 produce the writing and read the statement, together
 with any explanatory parts admissible under Rule 185
 (*post*, § 1575)].⁵

Par. (f). Whether the impeaching or the sustaining
 817 party may or must produce the writing immediately

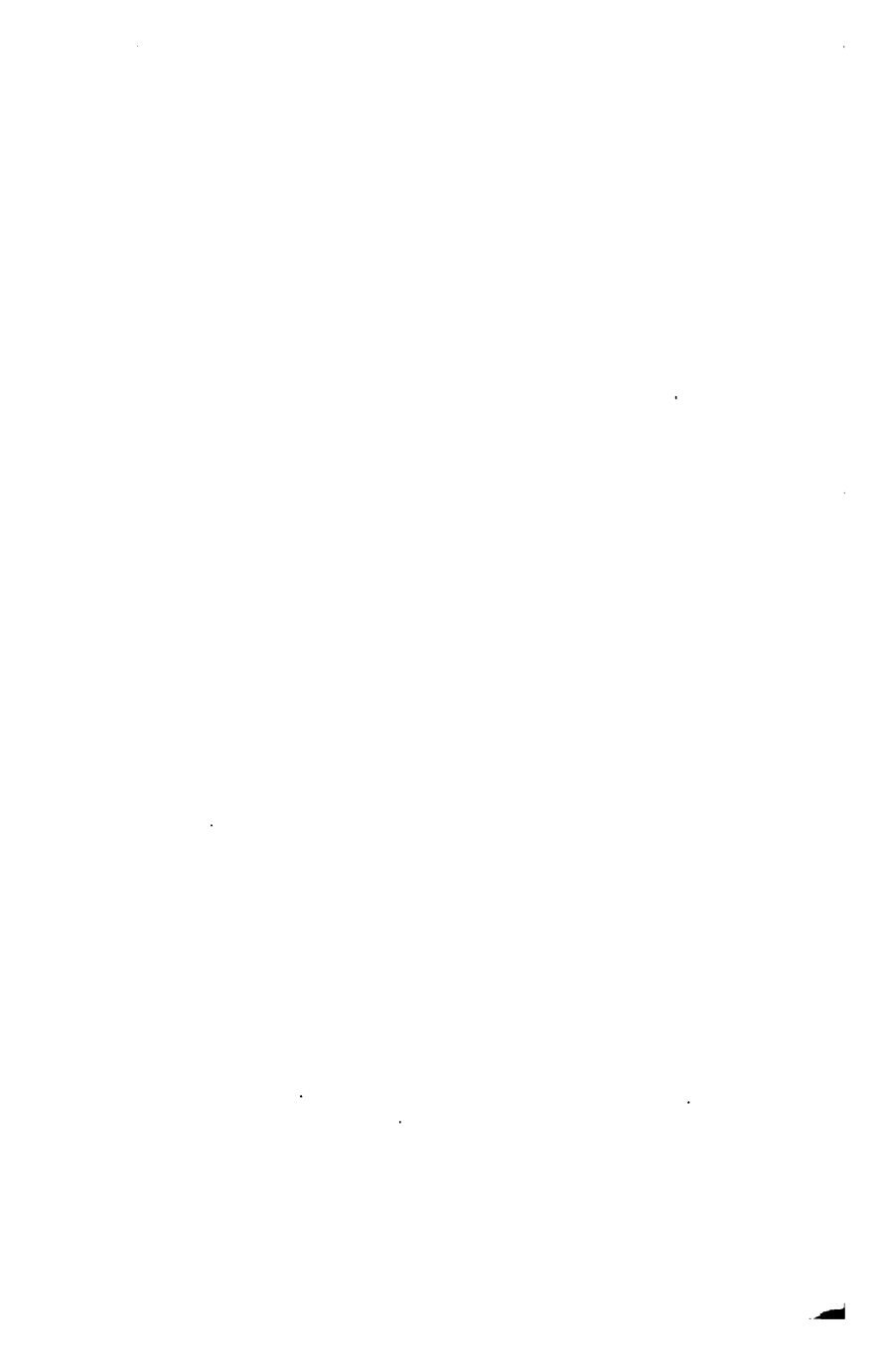
¹ This bracketed clause seems logically to be required.

² The contrary is the law in most jurisdictions; but is a gross error of principle and policy.

³ This stands or falls with Par. (a) above.

⁴ In strictness, only when he desires to prove the making of the statement; but to prevent false insinuations, the above rule is needed.

⁵ This is probably not law, but ought to be.



after the witness' reply or not until some appropriate later stage of the case, [is determined by the trial Court according to the circumstances.]¹

818 *Par. (g).* The foregoing rules apply to a writing made by the witness himself, or made by another person as a verbatim report of the witness' testimony or deposition-answers.

Illustrations. On cross-examination of a witness to the delivery of a bill of goods, the counsel desires to use against him an entry in a delivery-book, kept by him, reading "Party not found." The witness must be asked whether in a delivery book he ever wrote that about these goods, but he need not be shown the book. If he admits it, the book need not be produced; though perhaps the sustaining counsel might desire to call for it and might be able by means of it to refresh the witness' memory in explanation. If he denies it, the impeaching counsel must produce it; but he need not ordinarily offer it in evidence till he puts in his own party's case.

Distinctions. In using a deposition, the questions may arise (a) whether it can be used in the above manner, but on direct examination, to *discredit one's own witness* under Rule 97 (*ante*, § 504);

(b) whether, if thus allowable only to *refresh memory*, it is a proper writing for that purpose under Rule 90 (*ante*, § 448).

820 **RULE 128.** *Kinds of Secondary Evidence of Contents.* When pursuant to the foregoing rules the terms of a writing may be evidenced otherwise than by production of the writing itself, all other kinds of evidence, circumstantial and testimonial, are admissible,

subject to the following exceptions and qualifications:

821 **ART. 1.** *Circumstantial Evidence.* There are no special rules excluding circumstantial evidence of contents.

except that any rule, hereafter mentioned, preferring copy-testimony to other evidence, applies also to circumstantial evidence. — (W. § 1267.)

Illustration. Where the contents of a lost deed are to be evidenced, the parties' intentions, as shown in letters and deed-drafts, and their subsequent conduct in taking and

¹ It is commoner to say merely that the writing need not ordinarily be put in till the examiner's own case arrives.



giving possession, etc., are chief among the few available kinds of circumstantial evidence; any rule, however, preferring a copy of a recorded deed would prevail.

ART. 2. *Testimonial Evidence (Copy, Recollection)*. Testi-
822 monial evidence may consist in

a. *Oral testimony*, based on recollection, whether aided or unaided by memoranda pursuant to Rules 89, 90 (*ante*, §§ 431, 444).

b. *Written testimony*, i. e. by copy, transcribing the words of the original.¹

c. *Parties' admissions*. — (W. § 1268.)

Distinguish the rule of Completeness, which prescribes whether the whole or a part or every word of a document, as well as of an oral statement, must be testified to (Rule 184, *post*, § 1561).

ART. 3. *Same: Personal Knowledge of Witness*. A wit-
823 ness to the contents of a document must be qualified by personal observation of its contents, pursuant to Rule 86 (*ante*, § 400); unless in special circumstances as determined by the trial Court. — (W. §§ 1277-1280.)

In particular:

(1) A copy-witness must have *read the original*; except when the transcription is made

(a) by two persons, one reading aloud and the other transcribing;

or, (b) by a machine producing facsimiles.

(2) A copy-witness need not himself be the *transcriber*, provided at some time he personally compared transcription and original.

(3) The transcription must have been made *at the time of reading*, in order to rank as a copy preferred under Art. 5 below; unless at a later time the witness personally compared transcription and original.

ART. 4. *Same: Verifying Copy by Calling Witness*. No
824 paper can be received as a copy unless evidenced as such by a witness.

¹ In strict theory, a copy is merely a variety of recorded past recollection.

But the witness may give his evidence by certificate or otherwise, so far as permitted by the various exceptions to the hearsay rule (Rule 148 C, *post*, §§ 1145).

ART. 5. *Rules of Preference*: (1) *No Absolute Exclusion of Recollection-Testimony*. The principle of preferred evidence (Rule 129, *post*, § 850) finds here the following applications. — (W. § 1265.)

(1) There is no rule *absolutely excluding* recollection-testimony ("parol"), even for lost judicial records, deeds, or wills. — (W. § 1267.)

Cross-reference. Compare the rule as to proving the *substance* of the document (Rule 184, *post*, § 1561).

(2) There are rules *conditionally excluding* recollection-testimony until a copy is shown to be unavailable, as follows:

ART. 6. *Same*: (2) *Copy preferred to Recollection-Testimony*. A copy must be used, in preference to recollection-testimony, in the following cases:

826 [Par. (a). For *deeds* and other documents of title or obligation, if a copy is in the party's control.]¹ — (W. § 1268.)

827 Par. (b). For a *record* or other document in *public official custody*, if available at the time of trial for the purpose of copying. — (W. § 1269.)

828 Par. (c). For a *record of conviction of crime*, offered to disqualify or impeach a witness, [except when the witness himself on examination admits the conviction.]² — (W. § 1270.)

¹ Some Courts deny this altogether; some accept it, but enlarge the second clause to require searching for it in the control of others; some differ as to the kinds of documents covered by it.

² This is widely provided by statute. Some Courts preserve the common-law rule requiring a copy invariably. A few statutes go to the other extreme, by permitting recollection-testimony from other witnesses also. In a few jurisdictions the statutes differ for criminal and for civil cases.

100

100

100

100

100

100

100

100

100

100

100

100



829 *Par. (d).* For a *foreign law*, so far only as in the circumstances the precise terms of a *legislative or administrative enactment* are the essential object of the testimony.¹ — (W. § 1271.)

Distinguish (a) witness' qualifications as an *expert* under Rule 83 (*ante*, § 382); (*b*) the admissibility of *certified and printed copies* under Rule 148 C (*post*, §§ 1152, 1164); (*c*) the admissibility of *opinion* under Rule 173 (*post*, § 1447); (*d*) the function of *judge and jury* under Rule 229 (*post*, § 2100).

831 ART. 7. *Same*: (3) *Certified and Sworn Copies*. No specific kind of copy need be used, in preference to some other kind.

(*a*) In particular, a copy *certified* or *judicially* established is not preferred to a sworn copy.² — (W. § 1273.)

832 ART. 8. *Same*: (4) *Copy of a Copy*. An immediate copy is not preferred to a mediate copy, or *copy of a copy*, [[except where the trial Court deems it preferable in the circumstances]]; subject to the following specific rules:³ — (W. §§ 1274, 1275.)

833 *Par. (a).* Where the original, being an existing public record, is accessible for copying, and the mediate copy was made from an immediate copy of that record, an immediate copy is preferred.

834 *Par. (b).* Where the original is a lost or otherwise inaccessible private document, and an official record of it is accessible, an immediate copy of that record is preferred to a mediate copy of the record or of the original.

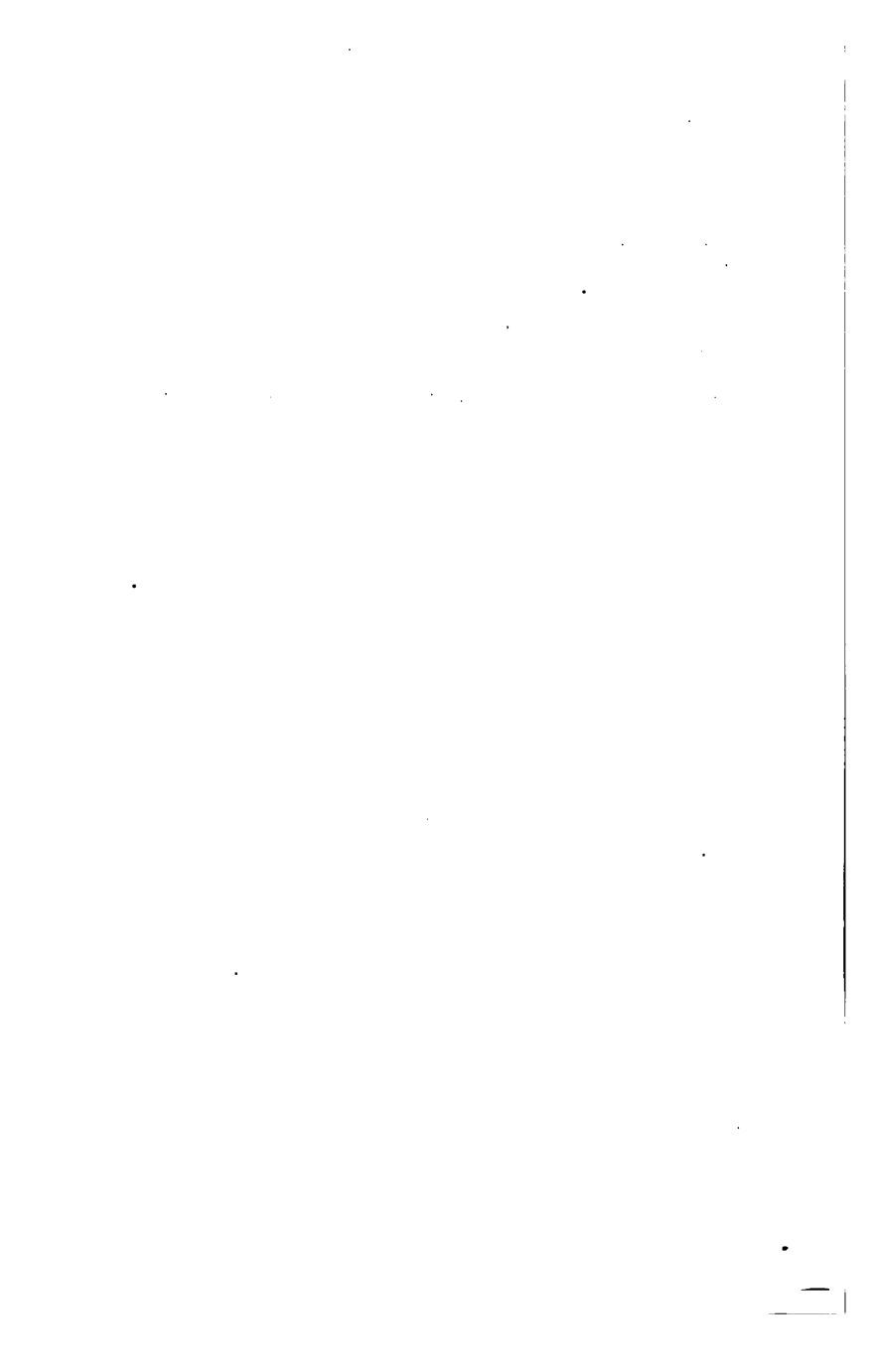
835 *Par. (c).* A mediate copy which has been compared with the original is admissible as an immediate copy; but a mediate copy is not admissible at all unless the correctness of the immediate copy from which it was made is evidenced.

Illustrations. (1) At a former trial of the same issue a sworn copy of a lost deed was introduced. The stenographer tran-

¹ Many jurisdictions do not state the rule so liberally.

² A few Courts are *contra* on Clause (*a*).

³ It is difficult to codify the complicated situations here presented; the soundest thing is to eliminate all quibbling rules of detail and leave it to the trial Court. The two rules in *Par. (a)* and (*b*) are Mr. Justice Story's.



scribed it. The stenographer's copy is admissible at the second trial, without accounting for the sworn copy; the deed not having been recorded. But if the deed had been recorded, then a certified copy would be obtainable and therefore required.

(2) Action on a promissory note; plea, payment; the defendant had given the note with a chattel mortgage; the defendant's copy had been made from the public record, but afterwards the defendant had compared it with the plaintiff's original; the record being for other reasons not legally admissible, yet the defendant's copy would be admissible.

SUB-TITLE II: TESTIMONIAL PREFERENCES

RULE 129. *Definition and General Principle.* (1) A rule of 850 testimonial preference is one which prefers the assertion of a specific witness to that of some other.

(2) A rule of *conditional preference* requires that the preferred witness be called to testify, if obtainable, before any other witness is called on that topic.

(3) A rule of *absolute preference* requires that the preferred witness' testimony, if obtainable, be the sole testimony on that topic and be not disputed by other testimony.

(4) There are *no rules of preference* except those contained in the ensuing Rules 130-133, and in the preceding Rule 128 applicable to the contents of documents. — (W. §§ 1285, 1286.)

TOPIC I: CONDITIONAL PREFERENCES

RULE 130. *Attesting-Witness to Documents; General Prin-* 851 ***ciple.*** (a) Where the execution of any document is required by law to have been made in the presence of another person

(b) who subscribes it for the purpose of validating its execution,

(c) a party desiring to prove its execution

(d) against an opponent entitled in the state of the issues to dispute its execution

(e) must before introducing other evidence

(f) introduce the attester as witness

(g) in such numbers as are required by law for attestation,

(h) or show his or their testimony to be unavailable

(i) and also authenticate the attestation, unless that is not feasible,

(j) as well as authenticate the party's signature. — (W. §§ 1287, 1288.)

(Reason and Policy. The policy of the rule of substantive law requiring the execution to take place in the presence of

other persons is in part based on the importance of providing in advance adequate testimony in case of a dispute over the authenticity of the transaction. Hence the law of Evidence should insist on obtaining the testimony of such pre-appointed persons, if possible.)

ART. 1. "(a). *Where the execution of any document is*
852 *required to have been made in the presence of another person.*"

The rule does not apply to a document which was attested but was not required to be attested as a condition of validity.¹

— (W. § 1290.)

Illustrations. Practically the rule applies to *wills* only, in most jurisdictions; deeds, contracts, notes, etc., are therefore without its scope.

ART. 2. "(b) *Who subscribes it for the purpose of validating*
853 *its execution.*" The rule does not apply to a public officer's certification or subscription for some other required purpose than to validate execution. — (W. § 1292.)

Illustration. A notary's subscription to a certificate of acknowledgment of a deed, required by law in order to obtain public record of it, is not an attestation.

ART. 3. "(c) *A party desiring to prove its execution.*"
854 The rule does not apply where the purpose is only to prove contents, delivery, existence, identity, or other circumstance not involving the authentic execution by the purporting maker. — (W. § 1293.)

Illustration. Trover for chattels obtained by fraud in exchange for a worthless deed; to prove the transaction of exchange, the rule does not apply.

[*Par. (a).* The rule does not apply where the execution
855 is only *collaterally* in issue.]² — (W. § 1291.)

ART. 4. "(d) *Against an opponent entitled in the state of*
856 *the issues to dispute execution.*" The rule does not apply

¹ At common law this limitation did not exist; sound policy has almost everywhere legislated as above.

² This is unnecessary, though some Courts recognize it. Some of these rulings had really in mind the rule of Art. 3 above; others were merely mitigating the needless strictness of the common law rule.

where the document's execution can not be disputed by the
opponent;
in particular,

857 *Par. (a)* Because of an *estoppel* or other rule of substantive law. — (W. § 1294.)

858 *Par. (b)* Because of a rule of *pleading*. — (W. § 1295.)

Illustration. Where by statute a sworn denial of execution is necessary and the execution is not in issue without such sworn denial, no attesting witness need be called; but such statutes may not apply to wills.

859 *Par. (c)*. Because of a *judicial admission* of execution. — (W. § 1296.)

Distinguish the ordinary admission under Art. 5, *infra*.

860 *Par. (d)*. Because of the opponent's *claim under the same instrument*. — (W. § 1297.)

Illustration. Trover for goods taken by an executor; the defendant pleads a bequest in the will; the plaintiff, in using the will, need not prove it, much less call the attesters.

861 *Par. (e)*. But not because of the opponent's *mere production* of the instrument without claiming under it.¹ — (W. § 1298.)

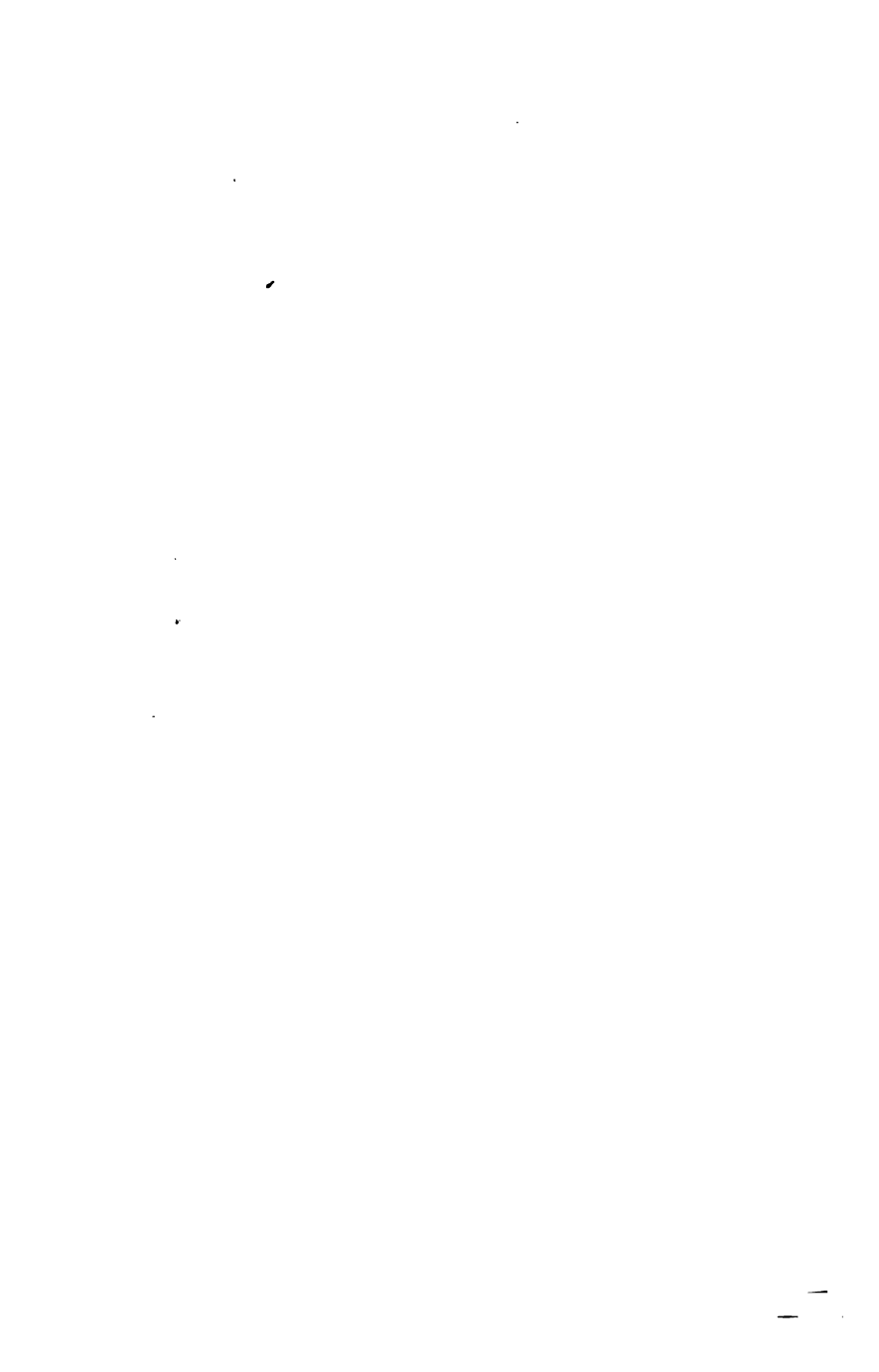
Distinguish the rule by which the opponent may be defaulted for *refusal to produce* on notice (Rule 161, *post*, § 1335).

862 ART. 5. “(e). *Must before introducing other evidence.*” The rule requires the calling of the attester before introducing any other evidence on that topic;
in particular,

863 [*Par. (a)* before introducing the testimony of the *maker* of the document.]² — (W. § 1299.)

¹ There was once some authority to the contrary in England.

² This is over-strict and probably not law in most jurisdictions; it has, moreover, practically no application nowadays, because wills alone are involved under the modern law.



864 *Par. (b) before introducing the opponent's extra-judicial admissions.*¹ — (W. § 1300.)

865 [*Par. (c) before introducing the opponent's personal testimony as a witness.*]² — (W. § 1301.)

866 ART. 6. "*(f). Introduce the attester as witness.*" The rule requires merely that the attester be used as witness. Hence, it does not prevent the party, after so doing, from then introducing other evidence to prove execution, even though the attester's testimony

(1) *fails to remember* the facts of execution;

(2) or, *denies* the facts of execution. — (W. § 1302.)

Distinctions. (a) The rule against *impeaching one's own witness* (Rule 97, *ante*, § 515) does not forbid the foregoing.

(b) A peculiar statutory Illinois rule does forbid the use of other testimony on an appeal from a grant of probate, but not from a refusal of probate. — (W. § 1303, note 3.)

(c) If the witness' present recollection fails, his *attesting signature*, authenticated by himself or another, serves as testimony to the facts of execution, under Art. 9, *infra*.

867 *Par. (a).* The rule is here satisfied if the attester's *deposition* or *former testimony* is used, where otherwise admissible under Rule 136 (*post*, § 928). — (W. § 1305.)

868 ART. 7. "*(g). In such numbers as are required by law for attestation.*" As many of the attesters must be introduced as were required by law to make the execution valid.³ — (W. § 1304.)

• *Illustration.* If three persons attested, but only two were required by law to attest, at least two must be produced; but any two.

¹ Courts differed as to this, under the common-law scope of the rule; but as applied to wills, the above rule is presumably universal.

² Courts differed as to this; but it ought not to be law, even for wills.

³ In common-law courts, one sufficed; in chancery, the required minimum number were usually called. By statutes, the rule varies, and is often ambiguous; the best policy seems to require the rule stated above.



ART. 8. "(h). Or show his or their testimony to be un-
869 available." In order to proceed to other evidence of execution
without the testimony of an attester, the party must satisfy
the judge that all the attesters, to the number required by
law for documentary execution,¹ are out of his power to intro-
duce for purposes of examination. — (W. §§ 1308, 1309.)

The following specific circumstances suffice to show an
attester unavailable:²

870 Par. (a). That the attester is *deceased*. — (W. § 1311.)

871 Par. (b). That the document is more than *thirty years*
old, so that the attesters are presumably deceased. — (W.
§ 1311.)

872 Par. (c). That the attester [is *without the jurisdiction*,
and is likely not to return before the close of the trial.]³ —
(W. § 1312.)

873 Par. (d). That the attester *cannot be found* after diligent
search. — (W. § 1313.)

874 Par. (e). That the attester's name is *not known*, by
reason of the loss or illegibility of the document bearing
it. — (W. § 1314.)

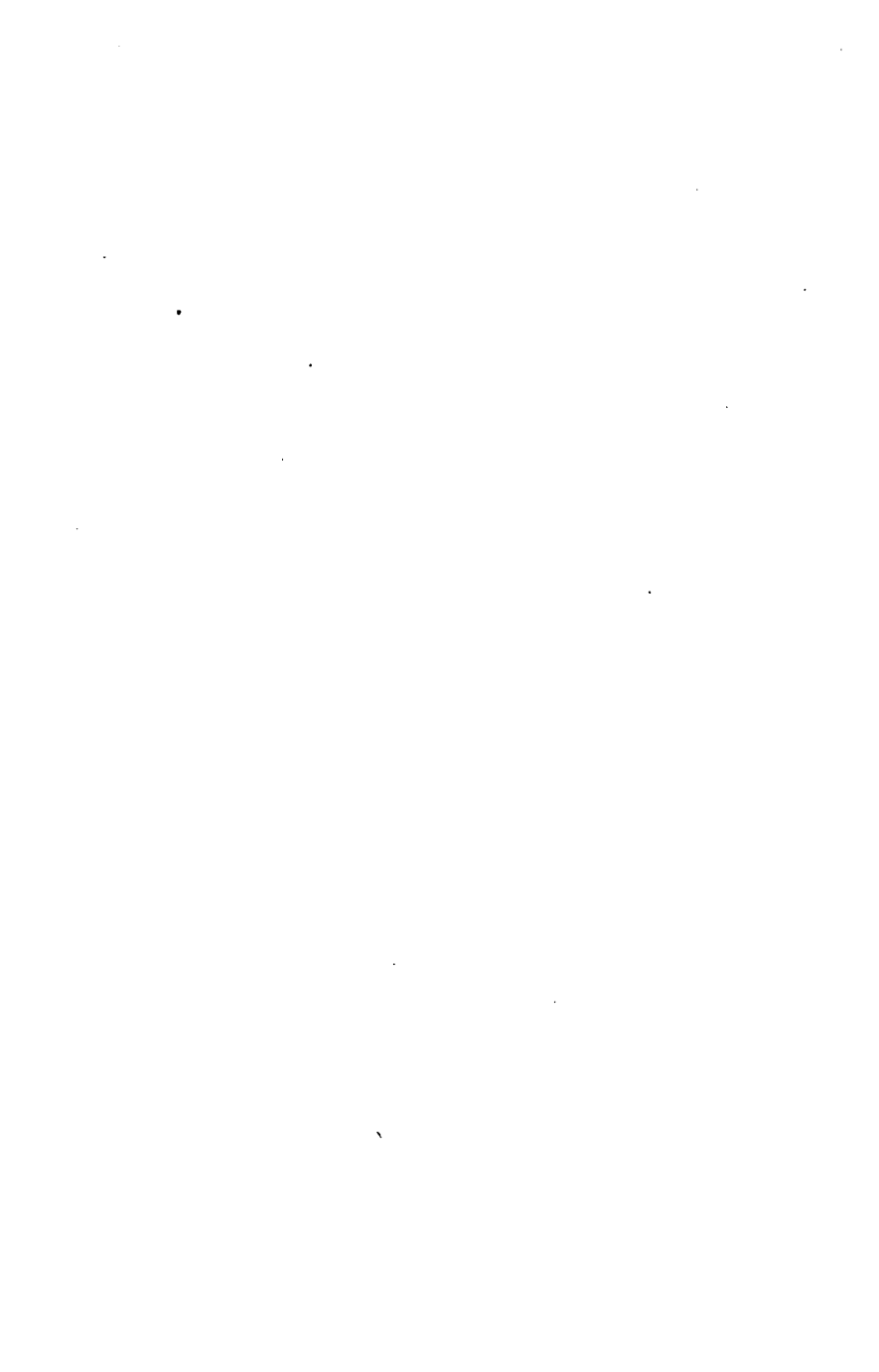
875 Par. (f). That the attester is so *ill* or *infirm* that his
attendance would involve danger to his life or his health.
— (W. § 1315.)

876 Par. (g). That the attester is *imprisoned* or otherwise
detained under sentence of court. — (W. § 1315.)

¹ At common law, the rule would have applied to all,
regardless of the legal number.

² Note that these specific circumstances are usually enumer-
ated incompletely in statutes, but the statutory list is not
exhaustive. — (W. § 1310.)

³ There is here some difference of practice as to the per-
manence of the attester's absence, as to the sufficiency of
proof of it, and as to the necessity of trying to obtain his
deposition; these should all be left to the trial Court's deter-
mination, under Par. (k), *infra*.



877 *Par. (h).* That the attester's testimony would be inadmissible by reason of interest, infamy, insanity, blindness, disease of memory, or otherwise. — (W. § 1316.)

878 *Par. (i).* That the attester, without the party's collusion, *refuses to testify*, by reason of privilege or otherwise. — (W. § 1317.)

879 [*Par. (j).* That the document is one which by law is required to be recorded in a public office, after attestation before a public officer, and is provable by certified copy of the record.]¹ — (W. § 1318.)

880 [*Par. (k).* The trial Court may allow other circumstances to dispense with the production of an attester; and may in any appropriate case require additional precautions, such as an attempt to obtain the deposition of an attester who is out of the jurisdiction or imprisoned or ill.]²

883 ART. 9. “(i). *And also authenticate the attestation, unless that is not feasible.*” When the testimony of an attester is dispensed with, under Art. 8 above, the party must nevertheless, before proceeding to other evidence of execution, introduce some evidence authenticating the genuineness of the attester's signature;³ — (W. § 1320.)

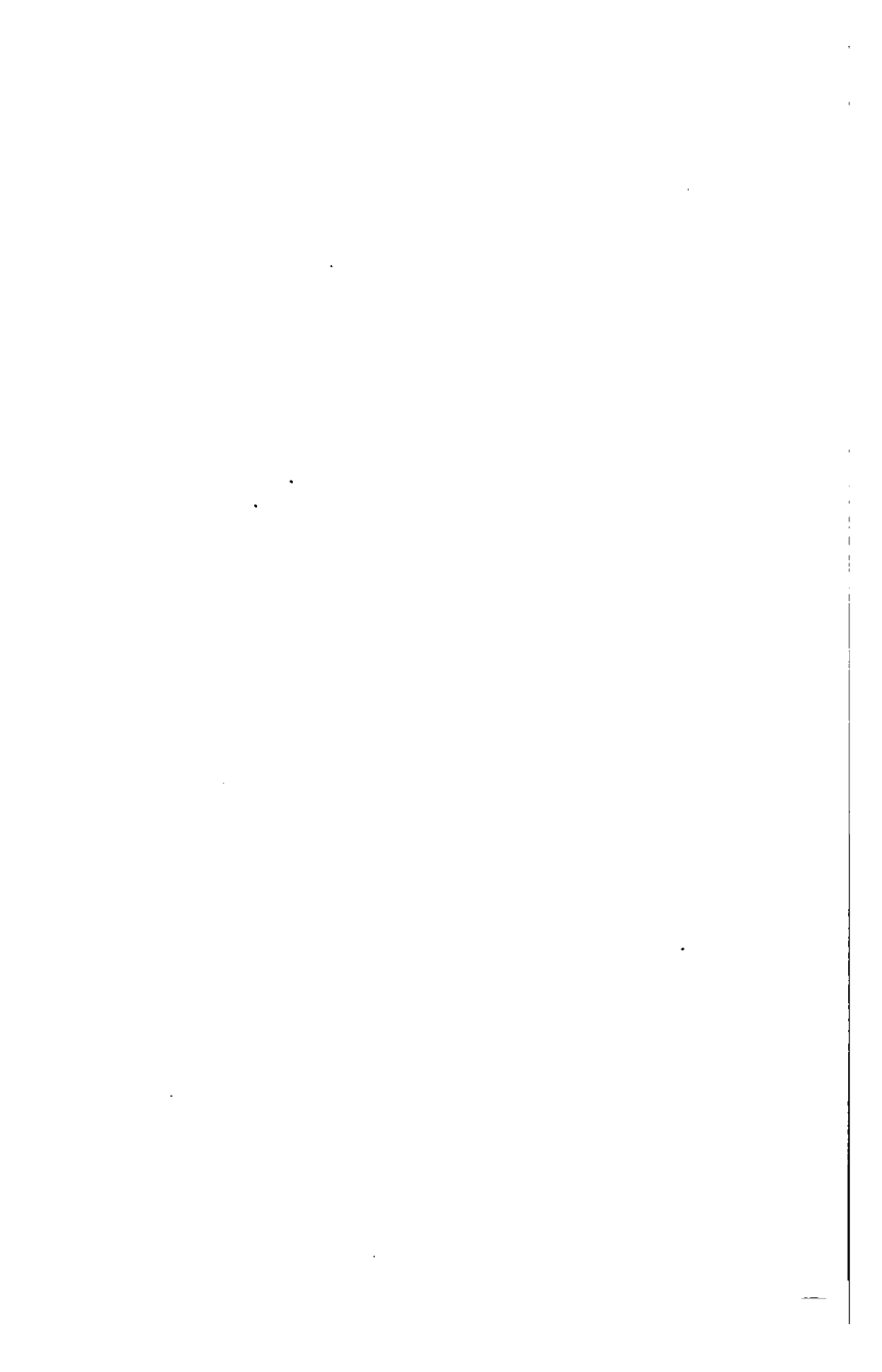
subject to the following detailed rules:

884 *Par. (a).* The authentication must be made for the signature of *as many attesters as are not produced*, until the number required by law for execution is fulfilled, either

¹ This was universally held for deeds; but whether it would now be applied to wills is doubtful.

² This rule is not now recognized in this form; but it supplies a desirable flexibility, so as to avoid the detailed questions that have hitherto arisen under *Par. (c), (d), etc.*

³ This was the rule at common law in England, but not in many American courts, for all attested documents; but it was the rule for wills in all courts. By statutory phrasings, not always clear, the above is commonly made the rule for wills.



by producing the attester or evidencing his signature.¹ — (W. § 1306.)

885 *Par. (b).* The authentication of signatures may be *dispensed with* where it is not feasible, by reason of lack of witnesses to handwriting or otherwise; but this does not relieve the party from somehow evidencing the fact of attestation where the validity of the document depends on attestation. — (W. § 1321.)

886 *Par. (c).* The signature of the attester, when evidenced, implies an assertion by him (admissible by exception to the hearsay rule under Rule 141, *post*, § 1000) of all the facts essential to the act of execution of the document, even though these facts are not expressly stated in a clause of attestation accompanying the signature.² — (W. §§ 1511, 1512.)

887 ART. 10. “(j). *As well as authenticate the party's signature.*” When the authentication of the attesters' signatures is made, under Art. 9 above, and no attester's testimony is produced, [the trial Court may also require some evidence of the signature of the party to the document, or of his identity with the party in the case, or of both.]³ — (W. § 1513.)

890 RULE 131. *Reports of Prior Testimony.* Whenever a magistrate or other officer has by law a duty to report in writing the entire tenor (not merely a part or the substance) of testimony orally delivered before him, his report is preferred conditionally; — (W. §§ 1326-1328.)

that is to say,

(1) It must be produced, or accounted for as lost or otherwise unavailable, before other evidence of the tenor of the testimony is received;

¹ At common law, for ordinary documents, proof of one attester's signature sufficed; but the rule for wills would be as above. Statutory phrasings are common, but often ambiguous.

² The last clause is doubtful in a few jurisdictions.

³ At common law, Courts were divided on this point; by statute, for wills, proof of the testator's signature is usually required. The above rule, by leaving it to the trial Court, secures the needed flexibility.

(2) If it is lost, or inadmissible because not lawfully taken (under Rule 148 B, *post*, § 1134), or otherwise unavailable, any other evidence on the subject is admissible;

(3) If it is inadmissible, it may still be made use of, either as a memorandum of recollection by the officer when testifying on the stand, or as a confession of an accused if read over to him and acknowledged correct;

(4) After it is produced and read, its correctness as a report may be disputed by other evidence, except so far as forbidden by Rule 133 (*post*, § 902).

Cross-reference. For the *admissibility* of these reports, by exception to the hearsay rule, see Rule 148 B, (*post*, § 1134).

ART. 1. *Accused's Statement.* The rule applies to a magis-
891 trate's report of statements made by an accused on examina-
tion before him.¹ — (W. § 1328.)

ART. 2. *Magistrate's Report of Witness' Testimony.* The
892 rule applies to a magistrate's report of testimony delivered
before him.

ART. 3. *Other Person's Reports of Testimony.* The rule
893 does not apply to any other person's report of testimony,
even though stenographic,
[except to an official stenographer's report.]² — (W.
§ 1330.)

Cross-reference. For *dying declarations*, see Rule 138, *post*,
§ 951.

ART. 4. *Depositions.* The rule does not apply to a deposi-
894 tion *de bene* reduced to writing by an officer authorized to take
depositions; inasmuch as a deposition is the testimony itself
(Rule 94, *ante*, § 490), and not merely a report of the testi-
mony; so that the proof of its tenor is governed by the rule
of integration, or parol evidence (Rule 219, *post*, § 1946),
hence the modifications contained in clauses 2, 3, and 4, of
this Rule 131, cannot be availed of.

¹ Statutes usually make it the magistrate's duty to report,
but often only "the substance."

² A majority of the few Courts that have ruled upon this
are *contra* to the clause in brackets.



Par. (d). A witness testifying by *copy*, to the contents of a document, is not preferred to a witness testifying by recollection, except as provided in Rule 128 (*ante*, §§ 826-835).

TOPIC II: ABSOLUTE PREFERENCES

RULE 133. *General Principle.* A rule of absolute preference 900 for a specific person's testimony (Rule 129, *ante*, § 850), inasmuch as it makes that person's testimony exclusive of all other evidence on the subject, is not recognized, in the policy of the law,

except [where the fact to be evidenced is one which affects innumerable parties in a right or duty common to all, or where adequate evidence of it would ordinarily be likely to become practically unavailable shortly after the occurrence, and where therefore the preappointment of some officially prepared testimony, to be conclusive as to the fact, would be desirable.]¹ Accordingly,

There are *no rules of absolute preference*, except as herein declared. — (W. §§ 1345, 1348.)

ART. 1. *Nature of an Absolute Preference.* Testimony is 901 said to be absolutely preferred, where it is both exclusive and conclusive, *i. e.* where to evidence a given fact a particular person's testimony (oral on the stand or written in report or record) will alone be received and may not be disputed by other evidence.

Distinctions. (1) *Parol Evidence Rule.* Where a transaction is reduced to a single writing or memorial, and the preceding oral negotiations are superseded, the "parol evidence," or integration rule (Rule 217, *post*, § 1920), may make the writing conclusive, *e. g.* in the case of a contract, deed, corporate record, etc.; but this is because the written memorial is the transaction and supersedes the other utterances, not because it is conclusive evidence in the true sense of "evidence." Such cases are therefore not instances of the present rule. — (W. § 1346.)

(2) *Judgments.* Where by any judicial proceeding a fact in controversy is determined, that fact may no longer be

¹ No such generalization has been judicially made. But the clause attempts to state the principle actually underlying the recognized exceptions.

disputable in any other suit or court; because the judgment is enforced without renewed investigation into the facts. This is not because the judgment is conclusive evidence, but because the later Court is willing, as a matter of procedure, to enforce the prior judgment without inquiring into the facts at all. Such cases are therefore not instances of the present rule. Examples of judgments in various forms are: the certificate of *privy examination of a married woman* executing a deed; *sheriff's returns*, as between the parties; *land-office* rulings, etc. — (W. § 1347.)

ART. 2. *Magistrate's Report of Testimony*. A magistrate's
902 report of testimony delivered before him by an accused or a witness is not conclusive as to the tenor of the testimony.¹ — (W. § 1349.)

Cross-references. (1) For the theory of a *deposition*, see Rule 131, Art. 4, *ante*, § 894.

(2) For the *conditional preference* of a magistrate's report, see Rule 131, Arts. 1, 2, *ante*, §§ 891, 892.

ART. 3. *Enrolled Copy of Legislative Act*. The enrolled
903 copy of a legislative act, signed by the proper officers and preserved in the proper place, is [not] conclusive, and thus is [not] indisputable by the journals or other evidence, in respect to

(1) the *tenor* of the act;²

(2) the due performance of any *rules of procedure* of passage, such as the number of votes or the like.³ — (W. § 1350.)

ART. 4. *Certificate of Election*. The certificate of election
904 officers is [not] conclusive.

(1) that a certain candidate has been elected;

(2) or, that a required number of qualified voters did vote for a certain candidate;

except where the ballots have been destroyed or appear untrustworthy.⁴ — (W. § 1351.)

¹ In England, the rule as to an accused's statements was otherwise.

² Many Courts hold *contra*.

³ Many Courts hold *contra*, especially where the Constitution requires the procedure to appear in the journals.

⁴ Courts differ here more or less; and statutes often make express provision.



ART. 5. *Sundry Instances.* The following kinds of con-
905 clusive testimony, being affected by the policy of the sub-
stantive law concerned, are not dealt with in this Code:
— (W. § 1352.)

- (1) a *statutory recital*;
- (2) a *certificate of taking an oath*;
- (3) a *certificate of acknowledging a deed*;
- (4) a *record of a deed*;
- (5) a *notary's protest*.

ART. 6. *Constitutionality of Statutes.* The Legislature
906 can [not] validly prescribe a rule of conclusive evidence binding
the Judiciary in the determination of controversies of fact
coming properly before them.¹

But this does not prevent the Legislature from

(1) regulating the effect of a judicial *judgment* or limiting
appeal from an inferior judicial officer; or

(2) giving conclusiveness to an *executive* or administra-
tive officer's determination in matters concerning the
performance of his duties. — (W. §§ 1353, 1354.)

Illustrations. (1) A statute may make conclusive a bank-
ruptcy commissioner's finding as to the debtor's insolvency;
i. e. may limit the right of appeal from him as a judicial officer.

(2) A statute may make conclusive the determination of
a land-officer as to the price for which public land ought to be
sold; but not the determination of an immigration officer as
to the citizenship of a person excluded as an alien immigrant
but claiming to be a citizen.

Distinctions. (1) A statute may validly make a rule of sub-
stantive law, even though in the language of a rule of evidence;
e. g. a statute making the setting of fire to be conclusive evi-
dence of negligence is really a statute creating liability irre-
spective of negligence.

(2) A statute may be invalid by reason of some constitu-
tional provision protecting property rights; *e. g.* a statute
giving a building lien and making the land owner's failure to
forbid it conclusive evidence of consent, gives the lien virtually
without consent, and thus may violate the guarantee of due
process of law.

907 *Par. (a).* The Legislature may make, under Rule 8
(*ante*, § 31), a rule of presumption (Rule 228, *post*, § 2034),

¹ There is much confusion here in the precedents.

TITLE II:

ANALYTIC RULES (HEARSAY RULE)

SUB-TITLE I: HEARSAY RULE IN GENERAL

910 RULE 134. *General Principle.* Every human assertion, offered testimonially (Rule 24, Art. 1, *ante*, § 106), *i. e.* as evidence of the truth of the fact asserted, must be subjected to two tests: — (W. § 1362.)

(1) The person making the assertion must be subjected to *cross-examination* by the opponent, *i. e.* must make it under such circumstances that the opponent has an adequate opportunity, if desired, to test the truth of the assertion by questions which the person is obliged to answer;

(2) The person making the assertion must be *confronted* with the opponent and the tribunal, *i. e.* must be in their presence when making the assertion.

(Reason and Policy. The test of cross-examination is found by experience to provide the most powerful means of ascertaining the circumstances which affect the trustworthiness of the witness' assertion. The mere assertion of the witness, especially when he is a partisan, leaves undisclosed innumerable details which may affect his grounds of knowledge, his interest, his bias, his character, and the supplementary and qualifying facts of the issue. The mere assertion is related to all these possible facts much as a flat outline drawing is to a painting with lights, shadows, perspective, and color. These additional elements can often be supplied by cross-examination only. Cross-examination is thus contrasted with three other conceivable modes of ascertaining the same facts: (1) *Direct* examination by the party offering the witness; here the party has a motive to suppress, rather than to disclose the discrediting facts; (2) Examination of *other witnesses* by the opponent; here the other witnesses will commonly not know the facts peculiarly affecting the first witness' credit; moreover, they might not be believed, whereas the witness would be, in discrediting himself; (3) *Judge's* questions to the witness; this is inadequate, under our system, because the judge has no prior information as to the probable facts, and because only a partisan counsel can

.

1

1

1

.

.

.

.

.

.

.....

properly assume the necessary attitude of skepticism toward the witness.) — (W. §§ 1367, 1368.)

Illustration. Breach of warranty of a horse; the plaintiff alleged that the horse was not 'kind' and could not be shod. The defendant called two witnesses. The first was a blacksmith who had shod the horse often; he answered that "he had no difficulty in shoeing him," that "he stood perfectly quiet." The second witness was an old man who had formerly owned the horse; when asked whether he had any trouble in getting the horse to a blacksmith's shop, he replied that he "never took him to a blacksmith's shop, while he owned him, for shoeing." The jury found for the defendant. The next day, the blacksmith explained away, to an attorney-friend, the witnesses' apparently convincing testimony: "I told the attorney that the horse stood perfectly quiet while I shod him; so he did; but I didn't tell that I had to hold him by the nose with a pair of pincers to make him stand. The old man said he never took the horse to a blacksmith's shop while he owned him; and no more did he; but he had to take him out into an open lot and cast him, before he could shoe him." Here a proper cross-examination would have exposed these facts and shown the real value of the testimony for the defendant.

ART. 1. *Cross-examination essential, but not Confrontation.*

911 The opportunity of cross-examination is indispensable, and is governed by Rule 135 (*post*, § 913).

The confrontation is designed primarily to secure the opportunity of cross-examination. Its subsidiary purpose, to secure an opportunity of observing the demeanor of the witness while testifying, may be dispensed with if not feasible, and is governed by Rule 136 (*post*, § 928). — (W. § 1365.)

ART. 2. *Hearsay Extra-judicial Assertions.* No extra-

912 judicial assertion, *i. e.* uttered otherwise than as provided in Rules 135 (Cross-examination) and 136 (Confrontation), is admissible for the purpose of giving credit to it as evidence of the fact asserted in it, whether it be oral or written, sworn or unsworn;

unless it falls within one of the exceptions provided in Rules 137-154 (*post*, § 950).

But an utterance not offered as a testimonial assertion, *i. e.* offered for some other purpose than to be credited as evidence of the fact asserted in it, is not forbidden by the present rule. The various classes of utterances thus falling

without the scope of the rule are enumerated in Rule 155 (*post*, § 1240).

TOPIC I:

THE RIGHT TO AN OPPORTUNITY OF CROSS-EXAMINATION OF AN OPPONENT'S WITNESS

RULE 135. General Principle. Every testimonial assertion
913 must be so presented that the opposing party has an opportunity to test its credit by cross-examination of the person making the assertion;
subject to the following details: — (W. § 1371.)

ART. 1. Kind of Tribunal or Officer; Notice. The testi-
914 mony must have been given before a tribunal or officer having by law the authority to take testimony and affording in practice an opportunity for cross-examination. — (W. §§ 1373-1376.)

Illustrations. The tribunal may be a *land-commissioner*, *bankruptcy-referee*, *arbitrator*, *coroner*, or any other, provided the above rule is fulfilled. The powers of officers, and the details of the procedure, do not fall within the scope of this Code (*ante*, § 11).

Par. (a). The circumstance that the officer cannot of
915 his own motion *compel an answer* without express ruling by a superior court is immaterial, provided he is by law authorized to take testimony.¹

Par. (b). Where the officer is not a tribunal having
916 regular pleadings or other prior litigious proceedings, but is merely an officer to take depositions, it must appear that the opponent was given a fair opportunity to cross-examine;

in particular,

(1) a written *notice* of the intended taking of the testimony at the time and place of taking; and

(2) a [*reasonable interval of time*] to attend.² — (W. §§ 1378-1382.)

¹ This is the case with notaries and other deposition-officers in many States.

² Statutes usually prescribe mandatory rules of thumb; but they should be left to the trial Court's discretion, as directory only.



917 *Par. (c).* Where the testimony is taken in *perpetuam memoriam*, i. e. in view of possible litigation,

(1) the notice may be given [by *publication*, to all persons not specifically known or attainable;]¹

(2) the testimony may be *recorded* in a public office for the purpose of further effects of notice.¹ — (W. § 1383.)

918 *Par. (d).* An *affidavit*, or other statement made under oath but not satisfying the present rule, is not admissible by reason merely of the oath. — (W. § 1384.)

Cross-reference. By Rule 4 (*ante*, § 8), the present rules do not apply in *ex parte* proceedings; affidavits may therefore in them be admissible.

919 **ART. 2. Issues and Parties.** The testimony must have been given in a controversy in which the issues and the parties were

(1) substantially the same as in the present cause where offered;

[[or, (2) so nearly the same that, in the trial judge's determination, the opportunity of cross-examination then actually offered to the opponent was an adequate equivalent for the purpose of testing the trustworthiness of the testimony.]]² — (W. §§ 1386-1388.)

Illustration. In an action by a child for personal injury, the testimony of M, defendant's car-driver, is given for the defendant. After M's death, an action for loss of services is brought by the parent who was in charge of the child at the time of injury. On a plea of contributory negligence, the issue is now different from that of the first action; and M's testimony would not be receivable, under Cl. (1). But if in fact M was or might have been then cross-examined as to the circumstances of the parent's conduct, his testimony should be receivable, under Cl. (2).

Distinguish (1) former testimony of a *opponent party* offered as an admission, under Rule 119, Art. 5 (*ante*, § 672);

(2) former testimony, in *malicious prosecution*, offered as evidencing probable cause (Rule 136, *post*, § 944).

¹ Statutes usually cover this. The above seems the simplest solution.

² The double-bracketed clause is not yet law. But there has been a mass of futile quibbling over the rule of Clause (1), and it is rational and unpractical in its arbitrary limitations. Statutes sometimes prescribe a rule of thumb.



920 *Par. (a).* It is not necessary that there should be mutuality of use, *i. e.* that the testimony now offered by A against B could equally have been offered by B against A. — (W. § 1388.)

In particular, the party who formerly was the opponent may now introduce the testimony then introduced against him; inasmuch as the party then offering it had opportunity of examination on it, though not in form a cross-examination.

921 *Par. (b).* A deposition taken before trial, but *not used by the party taking it*, may nevertheless be introduced by the opponent, inasmuch as the party taking it had opportunity of examination. — (W. § 1389.)

Distinguish the question whether the rule against *impeaching one's own witness* applies in such case to either party (Rule 97, Art. 5, *ante*, § 509).

922 ART. 3. *Procedure of the Examination.* The opportunity of cross-examination may have been inadequate by reason of some circumstance of the examination itself, [[and in such case the trial Court may admit or exclude the testimony already obtained by direct examination]]¹;

in particular, it may be inadequate because cross-examination, or a substantial part of it, was *made impossible*

923 *Par. (a).* By the witness' *death* or *illness* intervening after the direct examination; [unless the cross-examining party was responsible for the interruption.]² — (W. § 1390.)

924 *Par. (b).* By the witness' *refusal* to answer on a substantial part of the cross-examination. — (W. § 1391.)

925 *Par. (c).* By a *non-responsive* answer to a question, when the examination is had by written interrogatories filed beforehand, *i. e.* by so answering that the cross-examiner will have had no notice of some subject of the answer requiring cross-examination. — (W. § 1392.)

¹ The double-bracketed clause is not law, but ought to be.

² There is some variance of ruling on this subject.

926 *Par. (d).* By an answer to a *general* interrogatory filed beforehand, i. e. a question so broad that the answer produces the same unfairness as in *Par. (c)*. — (W. § 1392.)

927 [*Par. (e)*. By any other circumstance which substantially prevents a cross-examination where needed.]¹ — (W. § 1393.)

Illustrations. An interpreter for an alien witness might leave after direct examination; etc.

TOPIC II:

THE RIGHT TO CONFRONTATION OF AN OPPONENT'S WITNESS

928 **RULE 136. *General Principle.*** Every testimonial assertion must be made in the presence of the tribunal and the opponent, primarily in order that the opponent may exercise his opportunity to cross-examine (Rule 135), and, secondarily, in order that the tribunal may be enabled to observe the personality and the demeanor of the witness, while testifying, for the purpose of assisting in determining the credit to be given to his testimony. — (W. § 1395.)

929 **ART. 1. *Confrontation Dispensable where not Feasible.*** The first purpose being the primary one, the second one may be *dispensed with*, if it is no longer feasible, provided the first has been attained under Rule 135. — (W. § 1396.)

Par. (a). In a *criminal* case, the constitutional provision for confrontation does not prevent it from being dispensed with, where not feasible, but only requires that there shall have been an opportunity of cross-examination, under Rule 135, and thus admits

(1) depositions and

(2) former testimony

on the same terms as in civil cases.² — (W. §§ 1397, 1398.)

¹ This general phrasing has not yet been used; but it is justified by casual instances.

² In six or eight States, the Constitution has been interpreted otherwise, but erroneously.

Distinguish the situation where no *power* has been given to any officer to *take depositions* for the prosecution in criminal cases, under Rule 135 (*ante*, § 914); the deposition would there be inadmissible because of initial lack of power to take it, not because of the present principle.

Par. (b). For the same reason, the Constitutional provision does not, in a criminal case, prevent the use of

(1) *dying declarations*

(2) nor, of other statements admissible under the usual exceptions (Rule 137, *post*, § 950) to the hearsay rule. — (W. § 1398.)

Cross-reference. For the rule as to an *accused's presence* at a *jury's view*, see Rule 156, Art. 1 (*post*, § 1269).

ART. 2. *Conditions permitting it to be dispensed with.* A
930 deposition or former testimony, given so as to satisfy Rule 135 (*ante*, § 913) requiring an opportunity of cross-examination, may be received, instead of calling the witness to confront the tribunal and there testify, whenever the personal attendance of the witness for the purpose of testifying is not feasible;¹ — (W. §§ 1402, 1411-1413.)

that is to say,

931 *Par. (a).* When the witness is *dead*. — (W. § 1403.)

932 *Par. (b).* When the witness is *absent from the jurisdiction*, [unless the trial Court deems it reasonable to adjourn the trial or to require efforts made to persuade his attendance.]² — (W. § 1404.)

933 *Par. (c).* When the witness *cannot be found* after diligent search. — (W. § 1405.)

934 *Par. (d).* When the witness has been by the *opponent* *procured* to absent himself. — (W. § 1405.)

935 *Par. (e).* When the witness is so *ill, infirm, or aged*, that his attendance to testify would be impracticable or dangerous. — (W. § 1406.)

¹ Statutes always prescribe rules of thumb for depositions, and occasionally for former testimony.

² The bracketed clause is probably not law in more than a few States. Some Courts and statutes require residence, not merely absence, out of the State; this is too rigorous. A few decline to apply the rule in criminal cases.

936 *Par. (f).* When the witness is by reason of *official duty* privileged under Rule 200 (*post*, § 1685) from attending court. — (W. § 1407.)

937 *Par. (g).* When the witness *resides* [at such a distance from the place of trial that his personal attendance would cause excessive inconvenience.]¹ — (W. § 1407.)

938 *Par. (h).* When the witness is now *disqualified* from testifying, by reason of *insanity, interest, infamy*, or otherwise. — (W. §§ 1408-1410.)

939 [[*Par. (i).* When for any other reason the trial judge deems the witness to be unavailable for present testimony.]]²

940 ART. 3. *Proof of foregoing Conditions.* (1) The party offering the deposition or former testimony must satisfy the judge that one of the foregoing conditions is fulfilled.

[(2) But where, for the purpose of taking the deposition originally, a cause was shown which is likely to have continued to trial, the judge may dispense with further evidence.]³ — (W. § 1414.)

941 *Par. (a).* Where the witness is shown to be in court or otherwise available, his testimony in personal confrontation cannot be dispensed with.⁴ — (W. § 1415.)

942 ART. 4. *Rule not Applicable.* In determining the scope and application of the rule, the following distinctions arise: — (W. § 1416.)

Par. (a). When the deposition or former testimony of a *party opponent* as witness is offered against him as an admission, under Rule 119, Art. 5 (*ante*, § 672), the foregoing conditions do not apply.

943 *Par. (b).* When a deposition *taken but not used* by an opponent is offered, the foregoing conditions do apply.

¹ Statutes regulate this, for depositions, by a rule of thumb; but not for former testimony.

² This is not law, but ought to be.

³ This would probably be law in most jurisdictions.

⁴ A few Courts are *contra*, for depositions, erroneously construing statutes.

944 *Par. (c).* When an action is brought for *malicious prosecution*, and testimony at the original prosecution is offered in the action, the foregoing conditions do apply.

945 **ART. 5. *Exceptions to the Rule.*** The foregoing conditions do not apply in chancery proceedings, or wherever by analogy the chancery procedure is applicable.¹ — (W. § 1417.)

¹ This is necessary, to cover a few anomalous instances (Illinois probate procedure, Federal *dedimus potestatem* commission, etc.), in which by statute the deposition is receivable unconditionally.

SUB-TITLE II:

EXCEPTIONS TO THE HEARSAY RULE

RULE 137. *General Principle.* An extra-judicial assertion, 950 offered testimonially, but not satisfying the requirements of Rules 135 (Cross-examination) and 136 (Confrontation), may nevertheless be admitted, exceptionally, provided three general conditions are found fulfilled:

- (1) a *necessity* for using it;
- (2) a circumstance diminishing the *risk of untrustworthiness* ordinarily to be guarded against in hearsay assertions;
- (3) a *testimonial qualification* such as would have been required of the person if called as a witness. — (W. § 1420.)

This general principle is applied in the following specific rules.

(Reason and Policy. The foregoing principle is thus justified:

Necessity. The necessity may consist in the unavailability of other testimony from the same person, — as where he is deceased, or out of the jurisdiction, or detained by official duty; or in the probable inferiority of other evidence from the same person or other persons, and therefore in the probable loss of superior evidence, — as where the person is now biased but was then unbiased, or where the matter is ancient and the earlier evidence is perhaps superior. — (W. § 1421.) In such cases, it would be unreasonable to adhere rigidly to the rule.

Trustworthiness. The circumstances diminishing the risk of untrustworthiness may be such as make it likely that the utterance would be naturally sincere; or, if they were not inherently so, that other considerations, such as the danger of detection and the fear of punishment, would counteract the motive to falsify; or that the utterance was made under such conditions of publicity that an error, if any, would have been corrected by others, regardless of the original motives of the speaker or writer. These circumstances may be found, alone or united, to produce a diminution of the risk of untrustworthiness. — (W. § 1422.) In such conditions, the relaxation of the rule involves fewer drawbacks than it avoids.

Testimonial Qualifications. The assertion must have been made by a person who in the elements of knowledge, memory,

lack of self-interest, and the like, would have been qualified as a witness to testify if present; because the assertion is offered testimonially, and a less qualification could not be conceded to a witness speaking out of court than when speaking in court.) — (W. § 1424.)

RULE 138. *Dying Declarations.* A statement made by a person who is near to death and conscious thereof is admissible, after his death.

(*Reason.* The solemn situation is likely to silence the selfish motives for falsehood, and to impel only sincere utterances. The decease makes it impossible to obtain the person's testimony in court. The principle of Rule 137 is thus fulfilled.)

The following limitations apply:

ART. 1. *Scope of the Issue.* The issue may be

952 (1) a criminal charge of homicide, in which the death of the declarant is an essential element of the charge; — (W. §§ 1432, 1433, 1435.)

[(2) or, any other issue.]¹ — (W. §§ 1431, 1436.)

953 **ART. 2. *Subject of the Statement.*** The statement must concern the circumstances of the act causing the declarant's injury.² — (W. § 1434.)

954 **ART. 3. *Mental Condition of the Declarant.*** The declarant must be conscious that death is impending.

(1) *speedily*

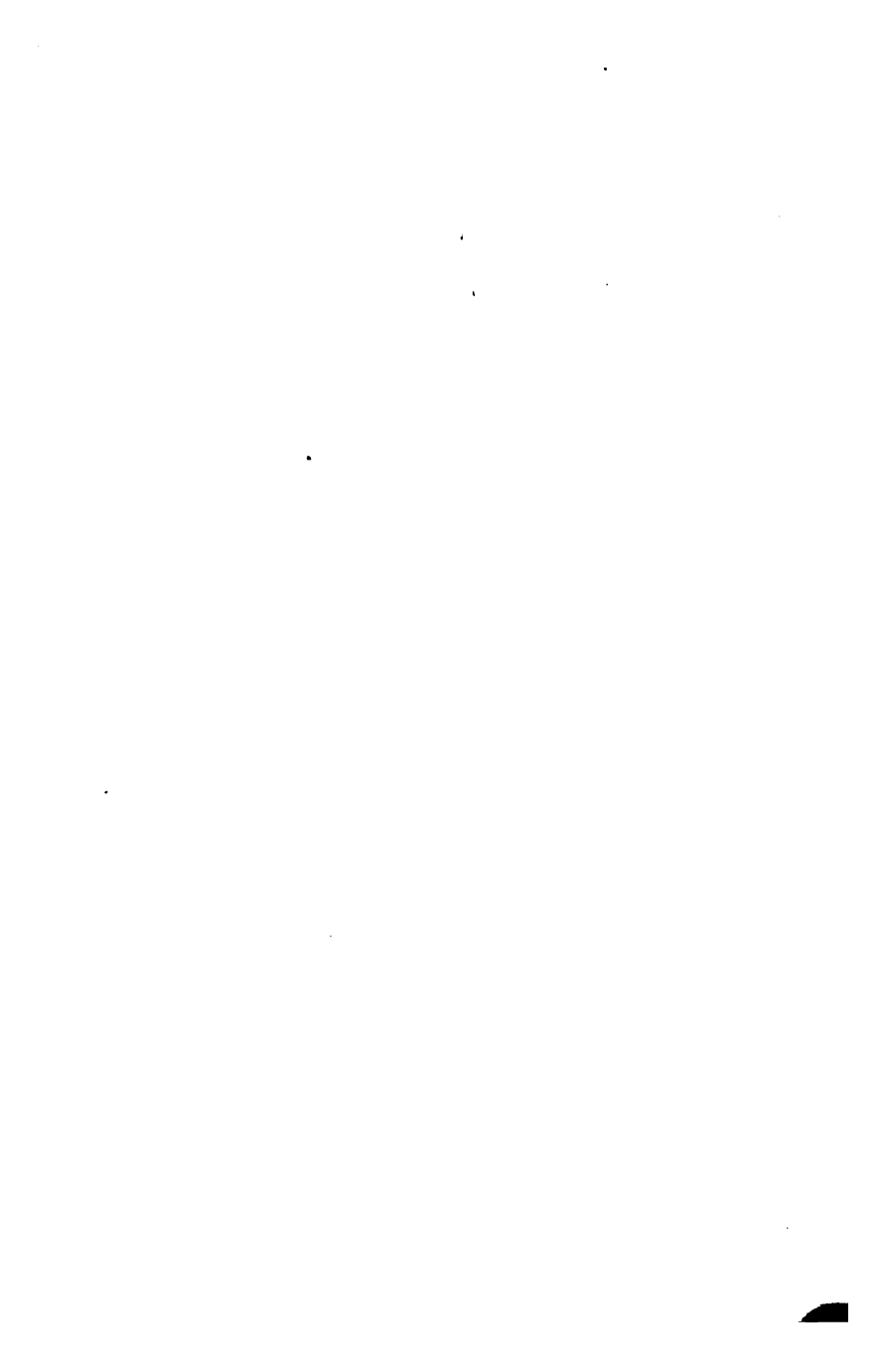
(2) and *certainly*. — (W. §§ 1438-1441.)

955 *Par. (a).* If the mental condition of the declarant is so affected by *hatred, disease*, or otherwise, as to make his statement untrustworthy, it is inadmissible. — (W. § 1443.)

956 *[[Par. (b).* Whether the declarant's mental condition is such as to render the statement admissible, is determined

¹ This is not now law, though it once was. Of course the limitation of cl. (1) is irrational.

² This is law, but equally irrational.



by the *trial judge*, under Rule 18 (*ante*, § 49).]]¹ — (W. § 1442.)

ART. 4. *Testimonial Qualifications, etc.* The statement is
957 not admissible as to any facts upon which the declarant would
not have been qualified as a witness. — (W. § 1445.)

958 *Par. (a).* Answers obtained by suggestive questions
(Rule 92, Art. 1, *ante*, § 462) are admissible, unless the
trial judge deems them untrustworthy. — (W. § 1445.)

959 *Par. (b).* A statement in *writing*, not assented to by
the declarant, may be used as a memorandum of recollec-
tion, under Rules 89, 90 (*ante*, §§ 431, 444). — (W. § 1445.)

960 *Par. (c).* The declarant may be *impeached* or *corrobo-*
rated as other witnesses are, by any appropriate mode. —
(W. § 1446.)

Cross-reference. For the specific rule as to *prior self-contradictions*, see Rule 108, Art. 3 (*ante*, § 579).

ART. 5. *Other Rules of Evidence applicable.* Other inde-
961 pendent rules of evidence are here applicable or not, as follows:

Par. (a). The rule against *opinion* (Rule 168, *post*,
§ 1410) is [[not]] here applicable.² — (W. § 1447.)

962 *Par. (b).* The rule of *completeness* (Rule 182, *post*,
§ 1547) applies to exclude a statement which is only a
part of what the declarant intended to make; but not to
exclude a statement which covers only a part of the facts
of the occurrence. — (W. § 1448.)

963 *Par. (c).* The rule as to *preferred reports* of testimony
(Rule 131, *ante*, § 890) applies as follows:

[(1). The *written report* of a hearer, giving the oral
statement, is not preferred;]³

¹ This is not law now; but it would save us in the future
from a mass of lumber on the subject, now in Supreme Court
rulings.

² The double-bracketed word is not law; but for lack of it,
many ridiculous quibbles disfigure our decisions.

³ A majority of rulings say this; but perhaps it is not good
policy.

(2) A written report of the statement, prepared by another person and *assented to by the declarant*, is preferred, but its correctness may be disputed;

(3) Where two statements are made at distinct times, and the later one is reduced to writing, either may be offered without the other. — (W. § 1450.)

ART. 6. *Judge and Jury*. Under Rule 229 (*post*, § 2100), 964 the trial judge determines the conditions for admitting the statement; but after it is admitted, its credibility is for the jury's discretion, [without regard to the legal rules of admissibility.]¹

RULE 139. *Statements of Facts against Interest*. A statement 966 of a fact which is against the interest of the declarant is admissible, if the declarant cannot be procured to testify in court.

(*Reason*. Self-interest induces men to be cautious in stating facts which are against that self-interest; the disserving nature of the fact diminishes decidedly the risk of untrustworthiness ordinarily present. When the declarant cannot be obtained to testify, a necessity arises for resorting to these statements. Thus the principle of Rule 137 (*ante*, § 950) is satisfied.) — (W. §§ 1455, 1457.)

The following limitations apply:

ART. 1. *Necessity for Using (Death, Absence, etc.)*. The 967 statement is admissible if the declarant is

(1) *deceased*;

[(2) or, *absent* from the jurisdiction;]

[[(3) or, *not to be found* after diligent search;]]

[(4) or, disqualified by *insanity* or otherwise;]

[[(5) or, not now available, by any other reason, as a witness.]]² — (W. § 1456.)

¹ A few Courts, however, hold incorrectly that the jury may or must reject it if it does not fulfil the rule as to consciousness of death.

² The precedents recognize only one or two of these grounds; but there is no reason for drawing an arbitrary line.



ART. 2. *Nature of the Interest disserved.* The interest dis-
 968 served by the fact stated must be one so palpable and positive
 that it would naturally be present in the declarant's mind at
 the time of the utterance;
 in particular, it may be

969 *Par. (a) a proprietary interest.* — (W. §§ 1458, 1459.)

Illustrations. A declaration that he held only a life-estate,
 or that his land-boundary went only to a certain tree.

970 *Par. (b) a pecuniary interest.* — (W. § 1460.)

Illustrations. A receipt for money; an indorsement discharg-
 ing a mortgage.

971 [[*Par. (c) a penal interest*]].¹ — (W. §§ 1476, 1477.)

Illustration. A fugitive from justice writes a letter from a
 foreign country confessing his own guilt and exonerating
 another person now charged; it ought to be admissible.

Distinguish the use of confessions of a *co-conspirator*, as
 admissions of a co-party (Rule 121, *ante*, § 687).

972 *Par. (d) any other interest involving a substantial
 liability, incapacity or loss.*² — (W. § 1461.)

Illustration. In a collision of vehicles, the owner of one states
 that it was his fault, in not keeping a careful lookout; this
 is admissible.

ART. 3. *Measure of Interest, etc.* In determining the
 973 existence of an interest disserved by the fact stated, the
 following distinctions apply:

Par. (a). The existence of a *counter-interest* does not
 exclude. — (W. § 1464.)

Illustration. In accounts, the self-charging entries are not
 made inadmissible because there are also discharging entries.

¹ This is not yet law; but it is absurd to maintain such a
 limitation. Esterhazy's confession from London, in the
 Dreyfus case, could not have been received under our law.

² Numerous precedents are recorded, but no such large
 phrasing.



974 *Par. (b).* An admissible statement which refers to or incorporates other statements makes them also admissible. — (W. § 1465.)

Illustration. An entry, in an account-book, of receipt of payment on July 1 for services performed on Jan. 1 admits the entry of services on Jan. 1 as thus referred to.

975 *Par. (c).* The fact stated must have been against interest *at the time* of the statement; in particular,

(1) where the entry is a creditor's receipt of payment by the debtor, and the payment is relied upon as an acknowledgment taking the debt out of the limitations-statute, the time of the entry must have been before expiry of the statutory period.¹ — (W. § 1466.)

976 ART. 4. *Sundry Rules applicable.* The following further rules apply here:

Distinctions. (1) An *opponent's admissions* are receivable on a distinct principle, having different limitations (Rule 116, *ante*, § 631).

(2) So also an *accused's confessions* in a criminal case (Rule 122, *ante*, § 700).

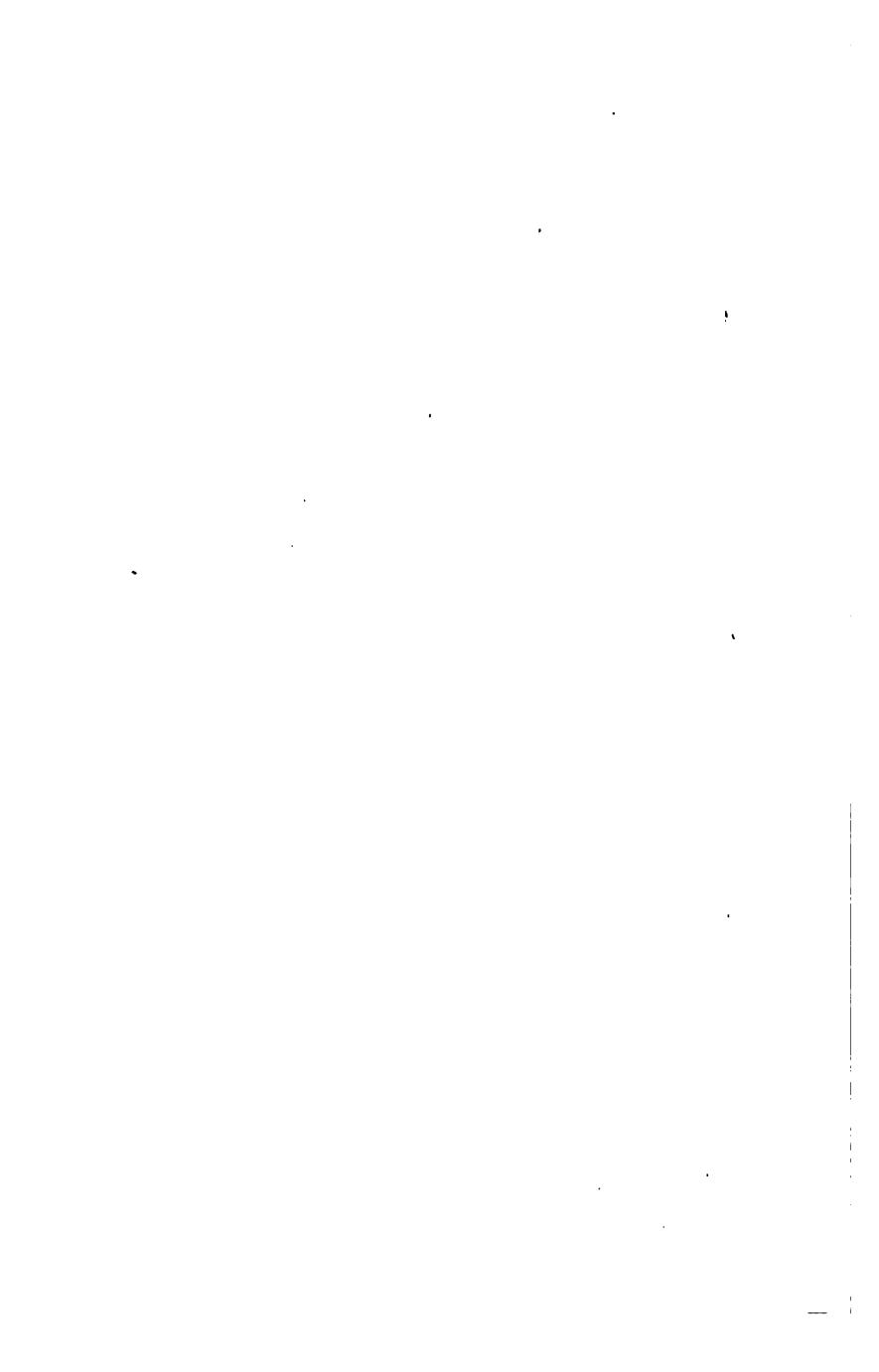
Par. (a). The declarant must be qualified as a witness, under Rule 86 (*ante*, § 400), to the fact stated. — (W. § 1471.)

977 *Par. (b).* The form of the statement may be *oral* or *written*.² — (W. § 1469.)

978 *Par. (c).* A written statement is subject to the ordinary rules for Production of Documentary Originals (Rule 126, *ante*, § 747), for Authentication (Rule 189, *post*, § 1595), and other rules applicable to writings. — (W. § 1472.)

¹ A few statutes expressly forbid the use of such entries; but this is unnecessary. Many States by statute deny to the debtor's mere act of payment any effect on the limitations-period, and thus the above evidence of entries is immaterial.

² In Massachusetts, statements of facts against pecuniary interest must be written and formal.



RULE 140. *Statements about Family History (Pedigree).*

980 The statement of a family-member, or the general family-repute, concerning a fact of family history, is admissible, when the declarant, or the family-members, are no longer available to testify in court. — (W. §§ 1480, 1482.)

(*Reason.* The mention or discussion of interesting facts of family history goes on ordinarily, in the daily life of the family, with spontaneous sincerity; moreover, the speakers, or some of them, have personal knowledge of the events. The statements are thus the natural effusions of persons who have knowledge and whose minds stand in an even position. Furthermore, the general repute in the family is the result of much discussion, in the course of which differing accounts have been reconciled and a residuum of unanimous belief is attained. There is a necessity for such evidence when the individual declarant cannot be had as a witness, or when the family-members whose repute is offered cannot be had. Thus the principle of Rule 137 (*ante*, § 950), underlying the exceptions to the hearsay rule, is satisfied.)

ART. 1. *Necessity for Using (Death, etc.).* The statement
981 is admissible only when other evidence from the same source is not available; — (W. § 1481.)
in particular, is admissible

Par. (a). When the declarant (if the statement is that of a specific individual) is *deceased, disqualified by insanity* or otherwise, *out of the jurisdiction*, [not to be found, or otherwise unavailable as a witness].¹ — (W. § 1481.)

982 *Par. (b).* When the most important *family-members* having personal knowledge (if the statement is in the form of general family-repute) are *not available* as witnesses.² — (W. § 1481.)

Illustration. By Art. 4 (*post*, § 993), an anonymous inscription of a death-date in a family Bible or on a tombstone represents the family-repute; in offering it, the mother and father should be shown to be deceased or otherwise unavailable. But if the statement is contained in a will or letter of the father, it is an individual statement, and only the father need be shown unavailable.

¹ The precedents do not go so far as this; but the principle is plain.

² There is confusion in the precedents; the above seems a liberal and practical solution.

ART. 2. *Absence of Bias or Interest.* The statement (or
983 repute) must not be made under circumstances likely to
create in the declarant's (or family's) mind a palpable bias
or interest on the subject of the statement. — (W. § 1484.)

In particular,

(1) it must be of a time before knowledge of any
controversy, within or without the family, concerning the
subject of the statement.¹ — (W. § 1483.)

ART. 3. *Testimonial Qualifications of the Declarant.* The
984 declarant (if an individual) must be one who, by kinship to
the person referred to in the statement, [or otherwise by living
with the person or family,²] has had adequate means of
knowledge of the matter mentioned or of the family-tradition
thereon. — (W. §§ 1486, 1488.)

In particular,

985 *Par. (a).* He need not have had *personal observation*
of the event (as required ordinarily for witnesses by Rule
86, Art. 5, *ante*, § 405); it suffices if he has heard the family
discussion or tradition from members of it. — (W. § 1486,
n. 1.)

Illustration. The deceased grandson's letter telling his grand-
father's name is admissible, though he never saw his grand-
father.

987 [*Par. (b).* He may be a *person not related* by blood or
by marriage, provided he has lived so long and so inti-
mately with the family or a member of it as to acquire
knowledge of its repute.]³ — (W. § 1487.)

Illustration. A letter of a deceased housekeeper, who had
lived forty years in the family, describing the wedding of one
of the daughters, is admissible.

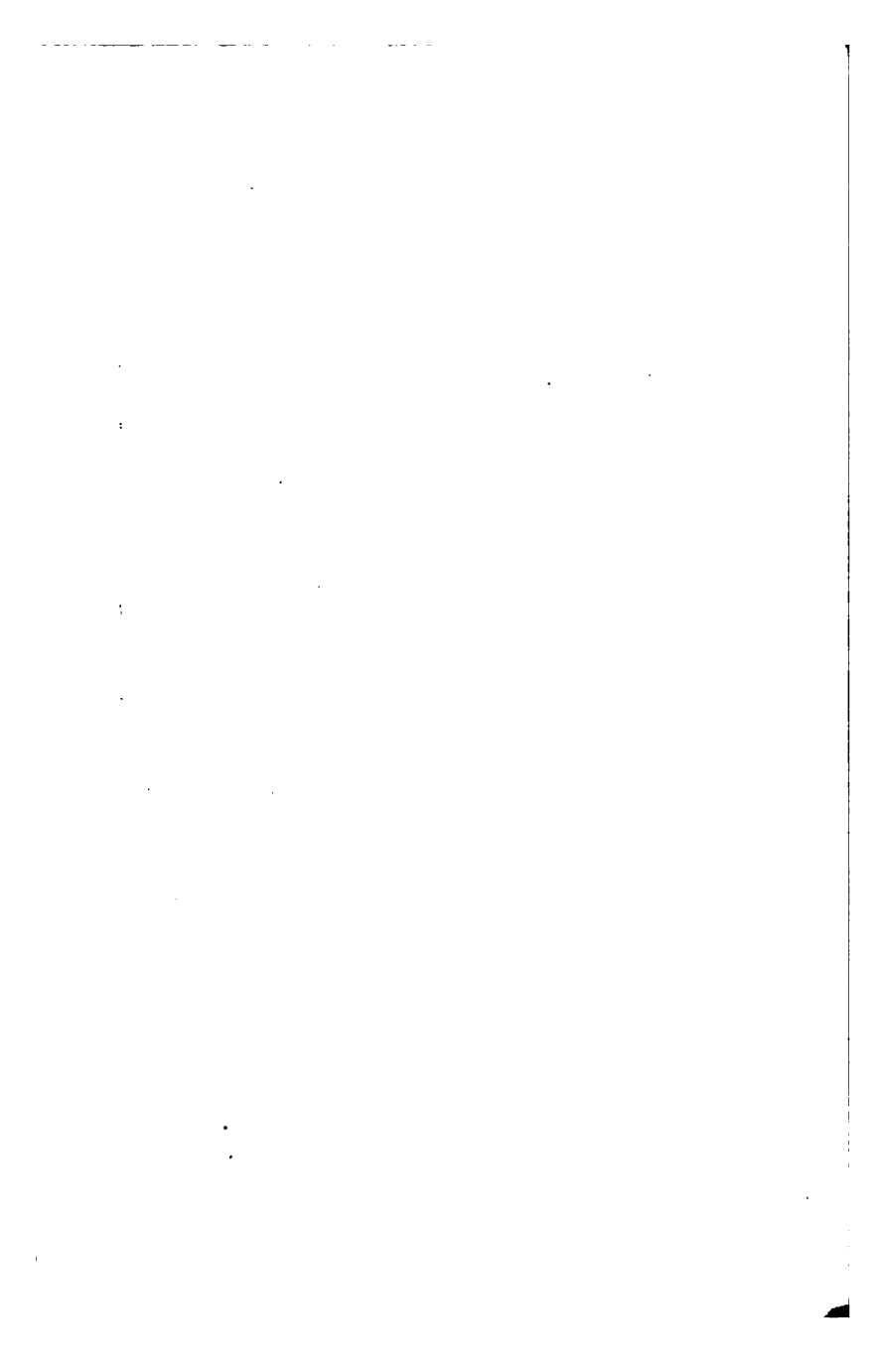
988 *Par. (c).* He may be *related* either by *blood* or by *mar-
riage*, and in any degree [unless under the circumstances
he appears to have been without adequate sources of
information.]⁴ — (W. § 1489.)

¹ The precedents have not agreed entirely; but the above
represents the kernel of the rule.

² This is to cover the rule of *Par. b, infra*.

³ This is not conceded by a majority of Courts; but it is
sound on principle.

⁴ The bracketed clause may not be law; but ought to be.



§§ 989-992 HEARSAY EXCEPTIONS: FAMILY HISTORY

Illustration. The declarant may be *husband*, or *wife*, or *brother-in-law*, of the person mentioned.

989 [Par. (d). He need not be related to any *person other than the one* who is the subject of the statement; in particular, to a third person whose estate, rights, or liabilities are the subject of the litigation.]¹ — (W. § 1491.)

Illustration. George Roe, son of John Roe, living in Boston, in 1894 frequently mentions that his father had a brother James who went out to California to seek gold in 1854. After George's death, these statements are offered to show that a certain James Roe of California was related to John Roe of Boston. These may be admitted on showing George to be John's son, and without showing George to be a nephew of James. But some Courts would make the second requirement, if it happened to be James who had since become rich and left an estate to which George's relatives made claim.

990 Par. (e). The relationship is not to be determined by the rules of property-inheritance, but by the natural conditions of family life.

[In particular,

(1) a declarant's statement about a person who is a natural but illegitimate relation is admissible.]² — (W. § 1492.)

991 Par. (f). The person testifying on the stand to the declaration admissible under the present rule need not himself be qualified under the foregoing rules; but merely must have heard or seen the declarant's statement or have been acquainted in the family enough to know its repute. — (W. § 1490, n. 1.)

Distinguish the use of a deceased person's statements of his family history offered merely to *identify* him with another person having a certain family history, and not to evidence the facts (W. § 1494). Here the statements are used circumstantially, under Rule 155 (*post*, § 1258).

992 ART. 4. *Form of the Statement.* The form of the statement or repute may be anything involving an assertion of fact. — (W. § 1495.)

¹ The contrary of this has been maintained, but erroneously, by some Courts.

² Where the declarant is not a *parent*, but some other member of the family, a few Courts are *contra*, but erroneously.

3. " *Chlorophyll* v. *Chlorophyll* - 5. *Chlorophyll* 107. 11
 4. " *Chlorophyll* v. *Chlorophyll* - 5. *Chlorophyll* 113
 5. " *Chlorophyll* v. *Chlorophyll* - 5. *Chlorophyll* 175. 11

6. " *Chlorophyll* v. *Chlorophyll* - 5. *Chlorophyll* 113. 11
 7. " *Chlorophyll* v. *Chlorophyll* - 5. *Chlorophyll* 113. 11
 8. " *Chlorophyll* v. *Chlorophyll* - 5. *Chlorophyll* 113. 11

In particular,

Par. (a). If an *individual statement*, it may be in words or in conduct, oral or written.

Illustrations. Wearing a ring engraved with a marriage date; educating a child as one's legitimate son; rehearsing a pedigree in a will.

993 *Par. (b).* If a family *repute*, it may be any word or act of any person assented to by the conduct of family life.

Illustration. Having in the family burial-lot a tombstone with an inscription; keeping in the common room a Bible with a record of family events; omitting to enter in the Bible record the name of an alleged child.

994 *Par. (c).* A person's testimony on the stand as to his *own age* may be admitted as testimony to the family *repute* of his age. — (W. § 1493.)

Cross-reference. It may also be admitted as a statement from his own knowledge under Rule 86 (*ante*, § 405).

995 ART. 5. *Subject of the Statement.* The subject of the statement may be any matter of the personal history of a member of the family, likely to be mentioned and accurately known in the family;
in particular,

(1) the fact, place, and time of birth, marriage, and death, the names, the degrees of relationship;

[(2), and any other such facts.]¹ — (W. §§ 1500-1502.)

996 ART. 6. *Kind of Litigation.* The statement is admissible [(1) regardless of the issue or kind of litigation in which it is offered.]

[(2) only in an action involving descent as an essential element of the issue.]² — (W. § 1503.)

Illustrations. On offering a family Bible to evidence age, the issue may arise on a plea of infancy to a note, or in a prosecution for marrying a minor, or on a representation in an insurance policy.

¹ The bracketed clause goes perhaps beyond the precedents; but there has been far too much strictness in them.

² Clause (1) is the only sound rule; Clause (2) is the rule of England and a minority of American States.

1870-1871

1871-1872

1872-1873

1873-1874

1874-1875

1875-1876

1876-1877

1877-1878

1878-1879

1879-1880

1880-1881

1881-1882

1882-1883

ART. 7. *Other Rules applicable.* The other rules concerning 997 writings are here applicable; in particular,

(1) the rule for Production of Documentary Originals (Rule 126, *ante*, § 747)

(2) the rule for Authentication (Rule 189, *post*, § 1585); but conduct or writing offered as embodying family-repute, under Art. 4 (above), need not be authenticated as that of a specific individual, and, conversely, conduct or writing offered and authenticated as that of an individual need not be shown to have been assented to by the family. — (W. § 1496.)

Illustration. If a record in a family Bible is offered as family repute, the handwriting need not be identified.

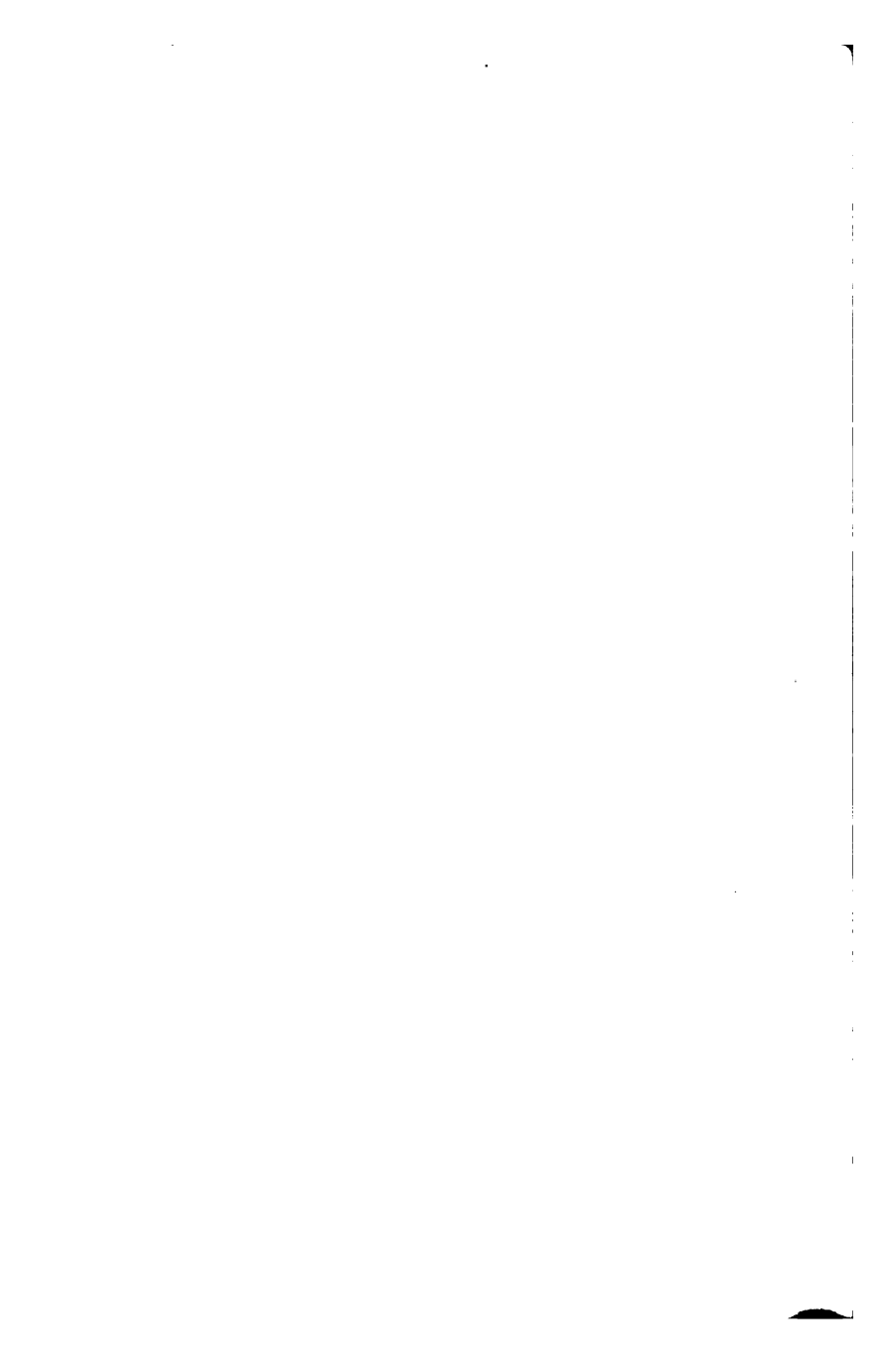
1000 RULE 141. *Attestation of a Subscribing Witness.* Whenever the attesting witness to a will or other document is not available for testifying in court to the execution of the document, his attestation may be used as testimony to the fact of execution, by authenticating his signature; subject to the detailed provisions of Rule 130 (*ante*, § 841). — (W. §§ 1505, 1508.)

(*Reason and Policy.* The witness' death or absence creates a necessity for resorting to his attestation-statement. That statement was made with deliberation and formality, looking forward to the probability of giving testimony thereto, and subject to possible prosecution for complicity in a forgery if falsely made. Thus there is a lessened risk of untrustworthiness; and the principle of Rule 137 (*ante*, § 950), underlying the exceptions to the hearsay rule, is satisfied.)

1001 *Par. (a).* The attesting-witness' credit may be impeached or supported like that of other witnesses. — (W. § 1514.)

Cross-reference. For impeachment by *self-contradictions*, see Rule 108 (*ante*, § 579).

1002 RULE 142. *Regular Entries in General.* Entries of acts or occurrences, made regularly in the course of one's occupation, freshly after the event, are admissible, when the entrant is deceased or otherwise unavailable for testimony in court. — (W. §§ 1518, 1519, 1522.)



(Reason and Policy. The habit and system of making regular entries for business purposes produces usually a correct statement, by the very trouble and difficulty of making false statements frequently, and by the usual absence of a motive to do so. An erroneous entry, if made, is likely to be detected and disputed by the associates or customers of the entrant. Moreover, when the entry is by a clerk or agent, his responsibility to his superior produces additional caution. When the entrant cannot be had, to testify in court, a necessity arises to take such other evidence from him as his entries supply. Thus the principle of Rule 137 (*ante*, § 950), underlying the exceptions to the hearsay rule, is fulfilled.)

1003 ART. 1. *Necessity for Using (Death, etc.).* The entry is admissible only when the entrant is deceased, disqualified by insanity or otherwise, out of the jurisdiction, [or otherwise unavailable to testify in court.]¹ — (W. § 1521.)

1004 *Par. (a).* Where an entry is made on the information of other persons, the practical difficulty of finding or procuring the other persons may suffice to admit the entry, as provided in Art. 3 (below).

1005 ART. 2. *Circumstances and Form of the Entry (Regularity, etc.).* The entry must have been made in keeping a record of matters occurring in one's relations with others and as a part of some occupation in life. — (W. § 1523.)

Illustrations. A priest's marriage-register, a ship-captain's log-book, a carpenter's day-book of work done, would be admissible; but not a private diary of weather, books read, etc.

1006 *Par. (a).* The entrant need not be under any duty to another person to make the entry.² — (W. § 1524.)

1007 *Par. (b).* The entry must have been *one of a series*, not a casual or isolated one. — (W. § 1525.)

1008 *Par. (c).* The entry must have been near enough to the *time of the event* for the entrant's recollection to be fairly trustworthy. — (W. § 1526.)

¹ Some Courts do not go so far as this broad phrasing. English rule was *contra*.

+ How about case when he has "forgotten" the
theme but can p. to the accuracy of the
story?

Ans: This is not a Q of regular criticism.
But of refreshing W's memory from
a memo,

§§ 1009-1014 HEARSAY EXCEPTIONS: REGULAR ENTRIES

1009 *Par. (d).* The entry must be recorded in writing or equivalent symbols. — (W. § 1531.)

Illustration. An employee's or watchman's time-register would be admissible.

1010 *Par. (e).* The lack of an entry in a series of written entries is admissible as an implied statement that no event occurred of the kind that would have been recorded. — (W. § 1531.)

1011 *Par. (f).* An oral report, made as one of a regular series, is not admissible;

except (1) under Art. 3 (below);

[(2) or, where in the circumstances it appears trustworthy.¹] — (W. § 1528.)

1012 *ART. 3. Personal Knowledge of the Entrant; Composite Entries.* On the principle of Rule 86, Art. 5 (*ante*, § 405), the entry must be based on personal observation; but this may be satisfied in any of the following ways: — (W. § 1530.)

1013 *Par. (a).* The entrant himself may have had personal observation of the event or transaction recorded; in this case, his absence must be accounted for under Art. 1 (above).

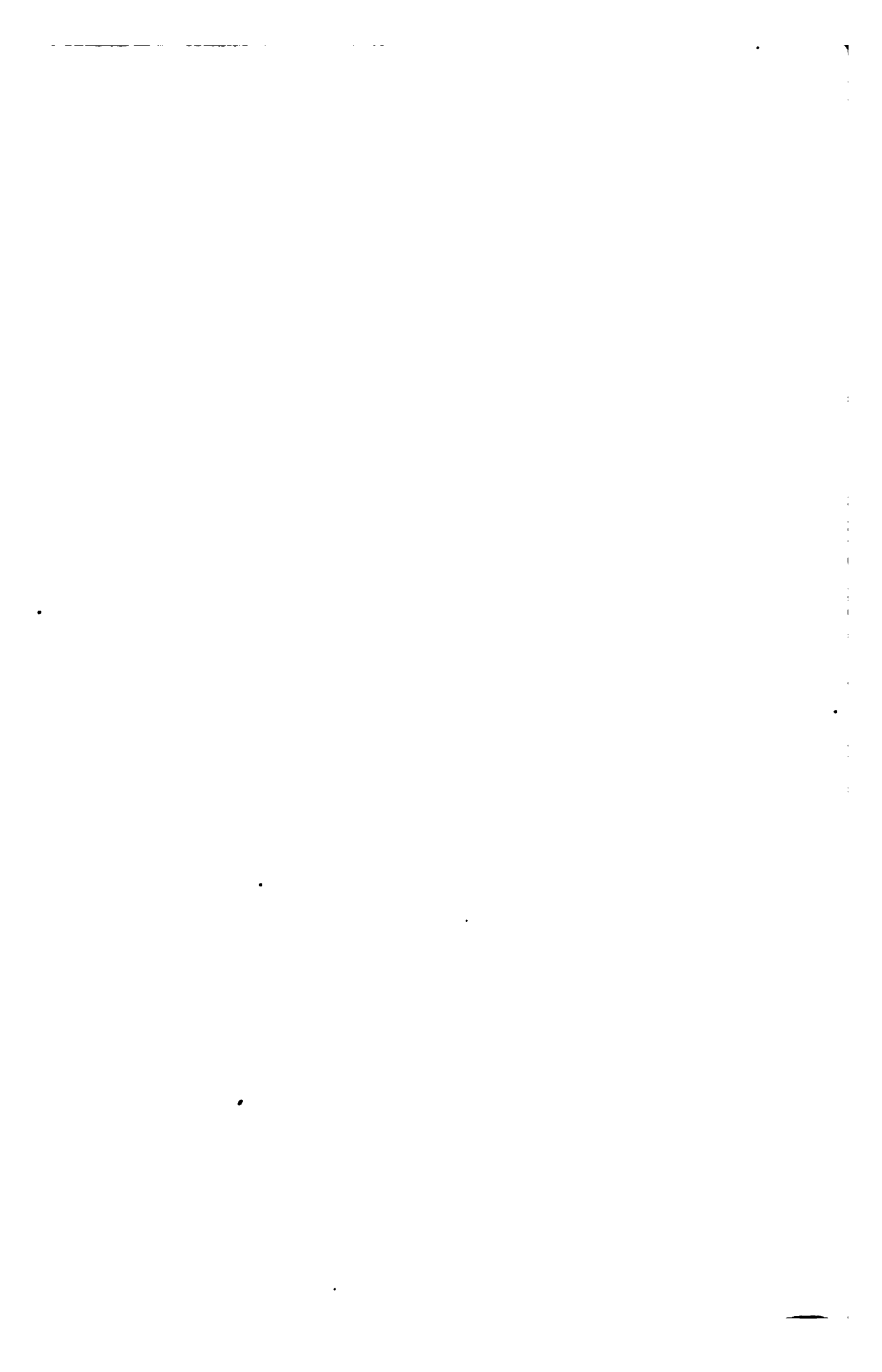
1014 *Par. (b).* The entrant may have only recorded an oral report or written memorandum, made in the regular course of business by *another person* or persons, the last of whom had personal observation, and each of whom makes a report or memorandum in a series which finally reaches the entrant; in this case, besides accounting for the absence of the entrant, the other person or persons must be accounted for

(1) either by reason of being deceased or otherwise unavailable, as in Art. 1 (above);

[(2) or, by reason of the practical difficulty of identifying or of procuring the personal attendance of the various persons.]²

¹ This is the rule in England only; but it deserves adoption.

² Not all Courts have yet agreed to accept this broad form of statement.



§§ 1015-1018 HEARSAY EXCEPTIONS: REGULAR ENTRIES

Illustrations. In an action for work done under a paving contract with a city, to prove the amount of work done the plaintiff produces a set of books kept by his clerk; the workmen had made oral reports to the foremen, the foremen had weekly time-sheets, and had handed them to the clerk, and the clerk had entered them; here the workmen need not be individually accounted for, under Cl. (2); the foremen should be individually accounted for, unless they were too numerous; the clerk should be accounted for; if the clerk is produced, the case falls under Par. (c).

1015 *Par. (c).* If the entrant is produced, and uses his entries as records of past recollection under Rule 89, Art. 4 (*ante*, § 438), then the other persons must still be accounted for under Par. (b).

Cross-reference. If the other persons also are produced as witnesses, then no exception to the hearsay rule is needed, and the joint testimony to the writing as a record of joint past recollection is admissible under Rule 89, Art. 4 (*ante*, § 438).

1016 *ART. 4. Production of Original Entry; Ledger.* Under the principle of Rule 126 (*ante*, § 747), the original document of entry must be produced or accounted for. — (W. § 1532.)

Par. (a). Where a composite entry is used under Art. 3 (above), the extent to which intermediate memoranda must be produced depends on the circumstances of each case.¹

Par. (b). As between *ledger* and day book or other kinds, the book required is that which contains the first regular and collected record of the transactions. — (W. § 1532.)

1018 *RULE 143. Regular Entries in Parties' Books.* Books of regular entries, made in the course of business, by a party to the cause or his agents, are admissible by exception to the hearsay rule; subject to the following distinctions: — (W. §§ 1519, 1536.)

Par. (a). The entries may be used, without needing any exception to the hearsay rule, as *records of past*

¹ This is the only practical way to treat this question.

recollection or aids to present recollection, by the maker of the entry, under Rules 89 (*ante*, § 431) or 90 (*ante*, § 444).¹

Distinction. In such a case, any casual memorandum may suffice; hence regularity of entry is immaterial.

Par. (b). The entries may be used by satisfying the requirements of Rule 142 (*ante*, § 1002) for the *general exception* in favor of regular entries.

Cross-reference. (1) For the use of a party's books by opponent, as admissions, see Rule 115 (*ante*, § 630). — (W. § 1557, n. 3.)

(2) For *corporate books*, as admissions by the stockholders, see Rule 119, Art. 4 (*ante*, § 672).

Par. (c). The entries may be used under a *special exception* to the hearsay rule, in favor of parties' account-books, as provided in the ensuing articles:

(Reason and Policy. This special exception grew into shape when the parties to a cause were disqualified as witnesses; hence, they might be totally unable to recover the just claims of ordinary mercantile litigation, for lack of testimony; and thus arose a necessity for using such evidence as was available. The shop-books were less likely to be untrustworthy, for reasons similar to those of Rule 142 (*ante*, § 1002). Thus the principle of Rule 137 (*ante*, § 950), underlying the exceptions to the hearsay rule, was satisfied. Since the abolition of parties' disqualification, this special exception has no longer a reason for survival; all its purposes can be attained under *Par. (a)* or *Par. (b)* above. But statutes had already enacted it; hence it remains. — (W. §§ 1536, 1537, 1546, 1560, 1561.)

[ART. 1. *No clerk.* The party must have been without
1019 a clerk who could testify to the transactions recorded.] —
(W. § 1538.)

ART. 2. *Subject of Entry; Cash Transactions.* The entries
1020 must not be of a matter on which other evidence would ordinarily be accessible by business custom;
in particular, they must not be

¹ This needs to be stated, though practitioners often forget it.

² Most Courts seem to ignore this in modern rulings, probably because the statutes usually ignored it.



§§ 1021-1027 HEARSAY EXCEPTIONS: PARTIES' ENTRIES

[*Par. (a).* Of *cash* transactions (payments, loans, receipts) of which other written memorials would ordinarily be extant.]¹ — (W. §§ 1539, 1549.)

1021 *Par. (b).* Of a transaction to which third persons could testify;
or of the terms of a *special contract*;
or of *large transactions*. — (W. §§ 1540-1543.)

1022 ART. 3. *Kind of Occupation* The party's occupation must be one in which account-books of business transactions are necessary to be kept. — (W. § 1547.)

1023 ART. 4. *Kind of Book; Regularity, Contemporaneousness, Honest Appearance.* The entries must be made

Par. (a) as part of a *regular series*, not casual nor intermittent. — (W. § 1548.)

1024 *Par. (b)* at a *time* near enough to the transaction for the entrant's recollection to be fairly trustworthy. — (W. § 1550.)

1025 *Par. (c)* without mutilation, erasures, or other *marks of dishonest manipulation*. — (W. § 1551.)

1026 ART. 5. *Reputation of Entrant.* There must be testimony to the good repute or habit of the party as to honest and correct accounting.² — (W. § 1552.)

1027 ART. 6. *Form of Entry.* In form, the entry may be

(1) on *any material*, or with any symbols;

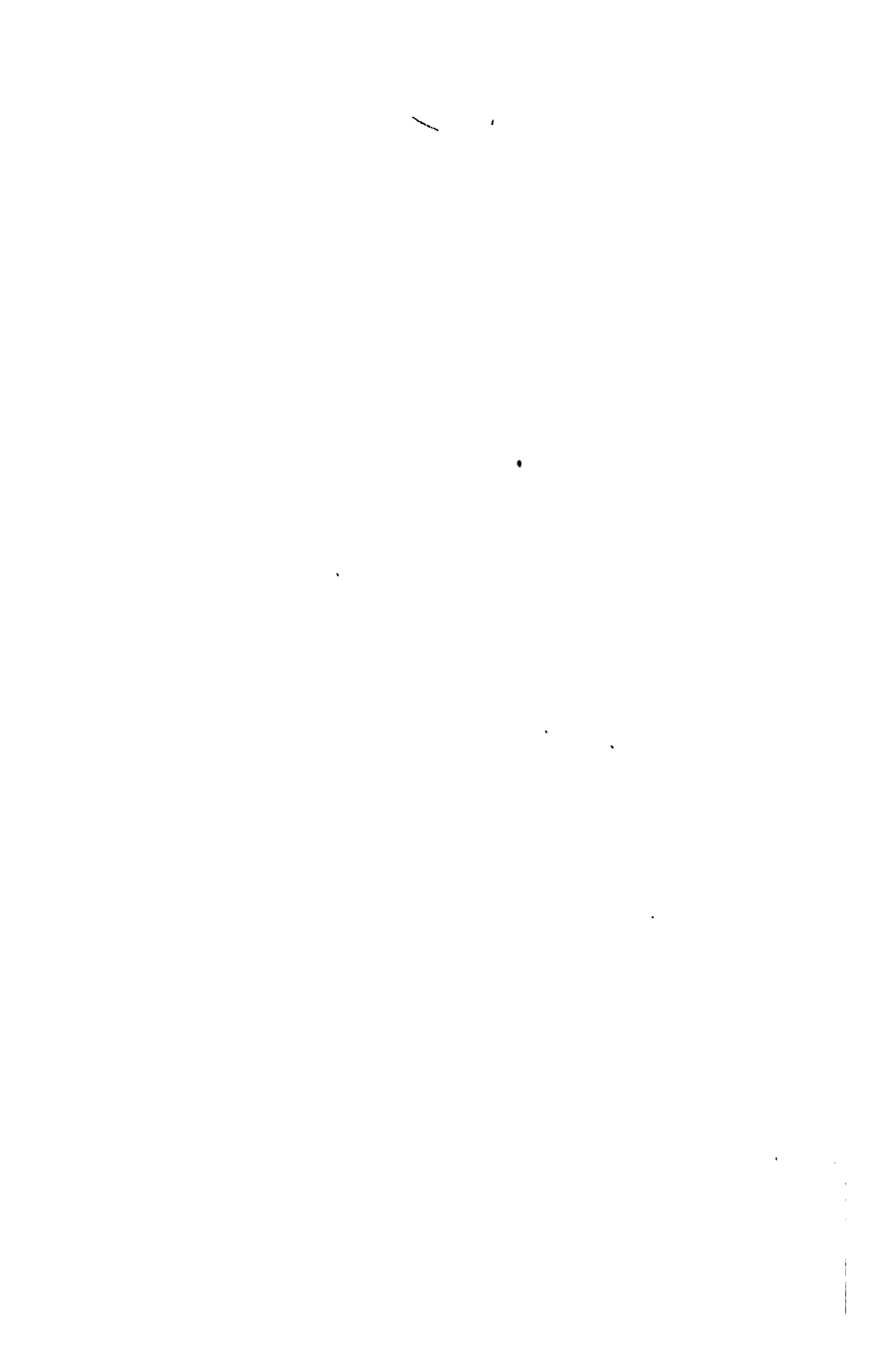
Illustrations: in pencil or ink, on paper or wood, etc.

[(2) *affirmative* or *negative*; the lack of an entry being an implied statement that no transaction was had.] — (W. § 1556.)

¹ A minority of Courts are *contra*; a few statutes and decisions limit the admissible amounts to \$5 or so.

² Perhaps this would not be enforced to-day.

³ Some Courts deny this.



ART. 7. *Personal Knowledge of Entrant; Composite Entries.*

1028 The entry must be based on the personal observation of the entrant, subject to the same detailed rules as provided in the general exception for regular entries by Rule 142, Art. 3 (*ante*, § 1012). — (W. § 1555.)

1029 *Par. (a).* The party must by his oath verify the correctness of the entries. — (W. § 1554.)

1030 *Par. (b).* This oath of the party is not equivalent to testimony, in the application of Rule 84, Art. 2 (*ante*, § 391) forbidding a survivor to testify against the deceased party to a transaction. — (W. § 1554.)

1031 *Par. (c).* But the party may be cross-examined on the subject of the entries, and may be otherwise impeached. — (W. § 1554, n. 4, § 1557.)

ART. 8. *Production of the Original Entry; Ledger.* Under

1032 the principle of Rule 126 (*ante*, § 747), the original document of entry must be produced or accounted for; and the application of this rule to ledgers or intermediate memoranda is made as provided in the general exception for regular entries by Rule 142, Art. 4 (*ante*, § 1015). — (W. § 1558.)

RULE 144. *Statements about Private Boundaries.* A state-

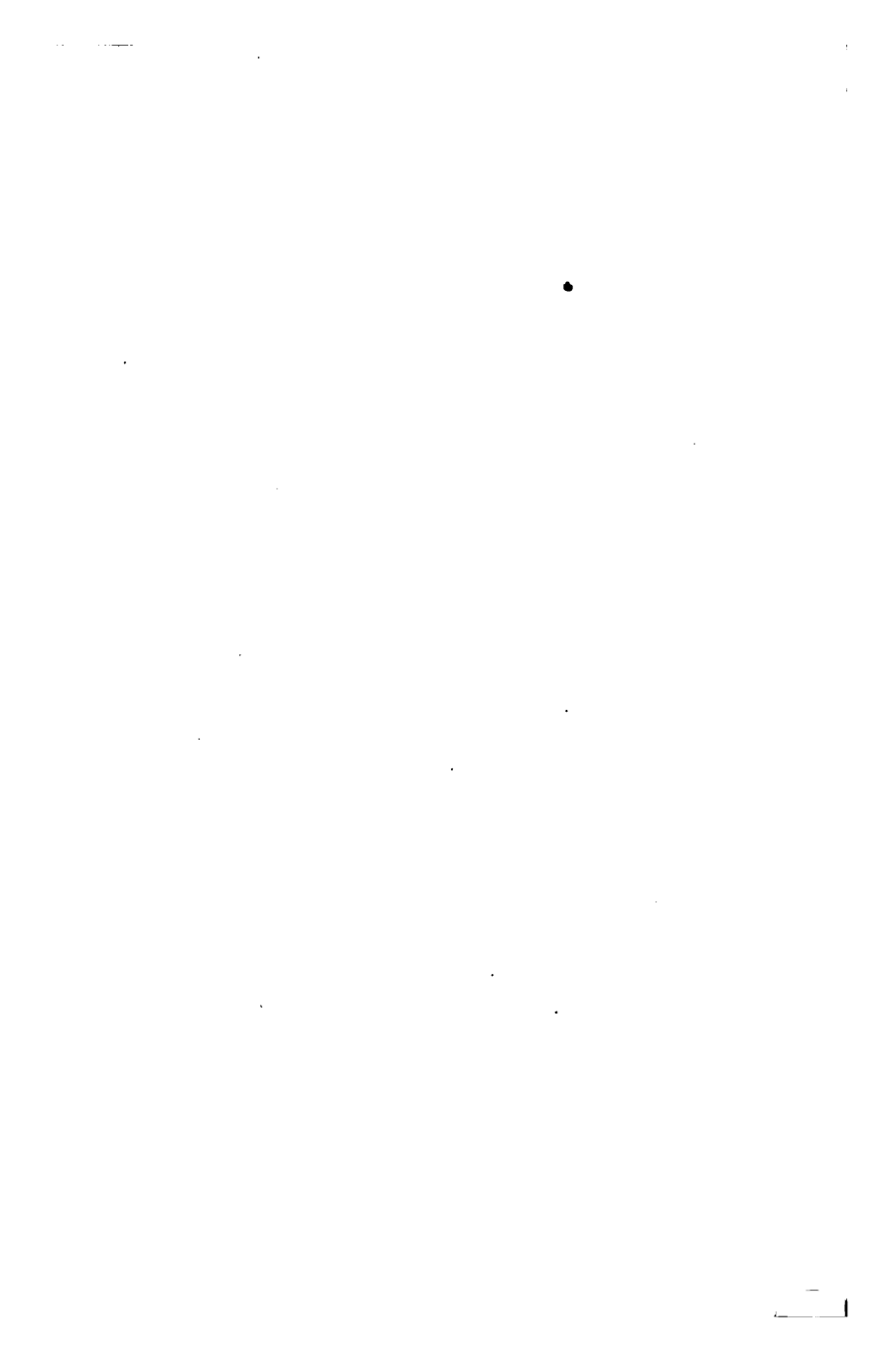
1035 ment as to the location of a boundary of private land, by a disinterested person, is admissible; subject to the following provisions: — (W. §§ 1564, 1566.)

(*Reason and Policy.* The perishableness of landmarks and the frequent scarcity of evidence identifying boundary locations, especially in matters coming from a former generation, create an urgent necessity to use any evidence not palpably untrustworthy. The statements of disinterested persons are free from some of the ordinary risks of untrustworthiness. The principle of Rule 137 (*ante*, § 950), underlying the exceptions to the hearsay rule, is thus fulfilled.)

ART. 1. *Declarant Unavailable.* The declarant must be

1036 deceased,
[out of the jurisdiction,
or otherwise unavailable].¹ — (W. § 1565.)

¹ For the bracketed clause there appear to be no precedents.



ART. 2. *Declarant Disinterested.* The declarant must be
1037 a person who is not interested in the land, or who, if inter-
ested, is stating a fact against his interest.¹ — (W. § 1566.)

[ART. 2a. *Declarant in Possession and on the Land.* The
declarant must have been at the time of the declaration
in possession as owner of the land,
on the land
and pointing out its boundaries.¹ — (W. § 1567.)]

ART. 3. *Declarant's Knowledge.* The declarant must have
1038 been qualified by knowledge of the boundary, as surveyor
or otherwise. — (W. § 1568.)

ART. 4. *Form of the Statement.* The statement may be
1039 oral or written.

Illustrations. Maps, surveys, etc., may be used.

Distinctions. (1) *Official maps* and surveys are also admis-
sible under the exception of Rule 148 B, Art. 2 (*post*, § 1133).

(2) *Reputation* as to boundary, voiced by deceased in-
dividuals, is admissible under the exception of Rule 147,
Art. 1 (*post*, § 1052).

(3) Statements of facts *against proprietary interest* are
admissible under the exception of Rule 139, Art. 2 (*ante*,
§ 968).

(4) A party's or privy's *admissions* of another's title are
admissible under Rule 121, Art. 4 (*ante*, § 691).

(5) Statements coloring the occupation, in title depending
on *possession*, are admissible as verbal acts, under Rule 155,
Art. 2 (*post*, § 1245).

RULE 145. *Ancient Deed-Recitals.* The recitals in an old
1040 deed of grant or the like are admissible to prove certain
matters of which other evidence is likely to be scarce, with
the following limitations:— (W. § 1573.)

(*Reason and Policy.* Similar considerations to those of Rule
144 justify this exception. The occurrence of the statements
in a formal document of an actual transaction lessens the risk
of untrustworthiness.)

¹ Art. 2 is the orthodox rule. Art. 2a is the Mas-
sachusetts form (followed in two or three Courts), and is
essentially different; it is really an application of Rule 155,
Art. 2 (*post*, § 1245).

ART. 1. *Deed must be Ancient.* The deed must be one
1041 executed in a prior generation.¹

ART. 2. *Corroboration by Possession.* The premises must
1042 have been in possession of the party claiming under the deed
[unless the circumstances sufficiently explain the lack of
possession].²

1043 ART. 3. *Subject of the Recital.* The recital may state
(1) either the *contents of another deed*, which is shown
to have once existed and to be now lost;

(2) or, the facts of *family relationship* of a party con-
cerned in the title;

[(3) or, the location of a boundary, which has been acted
on by possession in accord with the recital].³—(W. § 1573.)

Distinctions. (1) The recitals may also be used, but against
privies in title only, as *admissions*, under Rule 121, Art. 4
(*ante*, § 691).

(2) The recitals in a *sheriff's* or other official's deed may
be admissible under the exception of Rule 148 B, Art. 1 (*post*,
§ 1131).

(3) The use of a deed as *evidence of possession* (Rule 41,
Art. 7, *ante*, § 203) or as a *verbal act* (Rule 155, Art. 2, *post*,
§ 1245) involves distinct rules.

[RULE 146. *Statements of Deceased Persons in general.* A
1045 statement of any person deceased is admissible in the following
cases]:— (W. § 1576.)

1046 [Par. (a). In case of any action brought *by or against*
the representatives or privies in title of the deceased per-
son;]⁴

1047 [Par. (b). In *any case*, when under the circumstances
it appears to have been made in good faith and upon
personal observation.]⁵

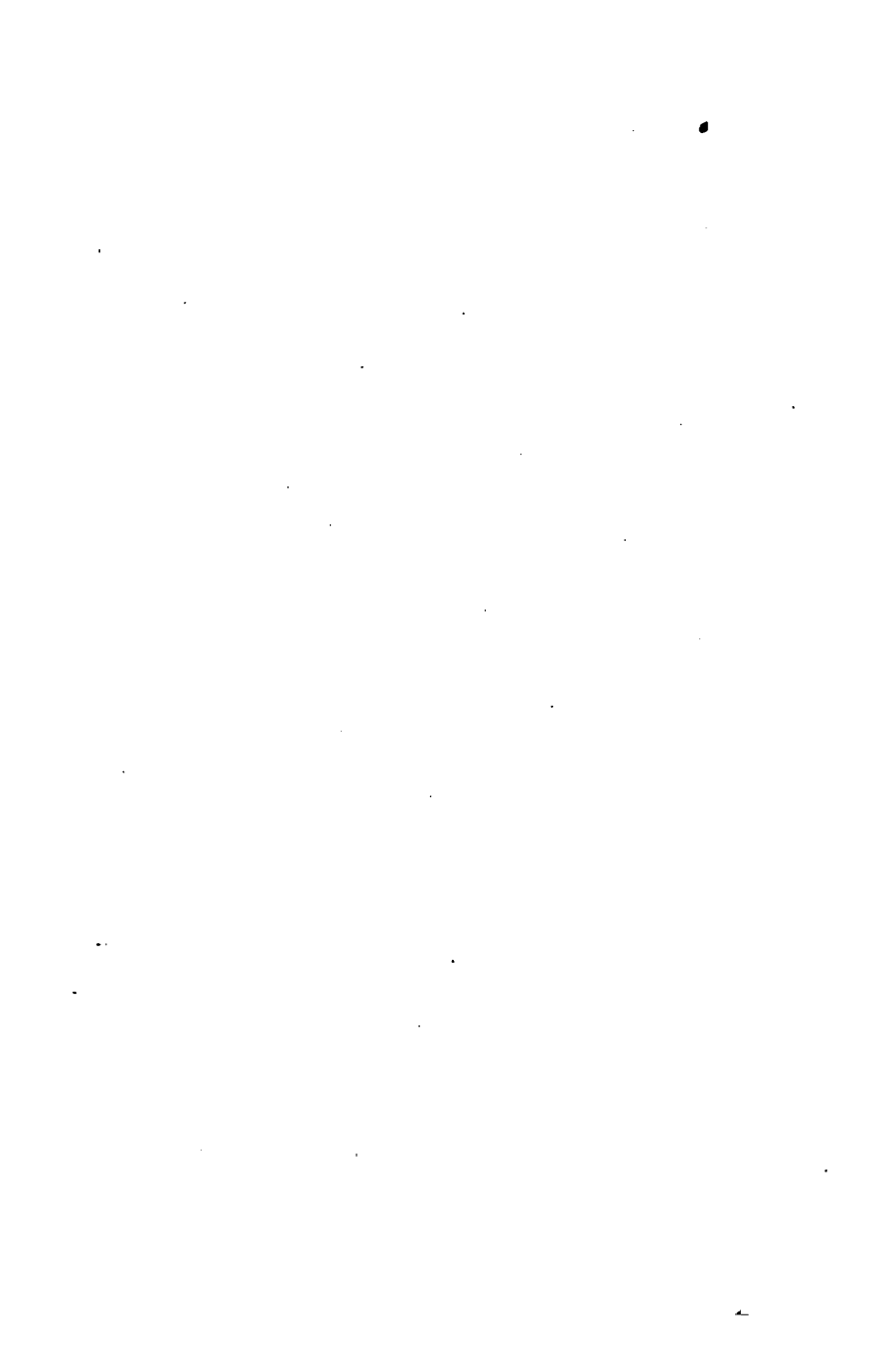
¹ There is little authority. The details of Rule 190 (*post*,
§ 1608) would presumably apply, in evidencing genuineness.

² Most Courts require this; the bracketed clause gives the
necessary flexibility.

³ This is a Massachusetts rule only.

⁴ This is the statutory law in Connecticut, and, in part, in
Massachusetts and Oregon.

⁵ This is by statute the law in Massachusetts only; but it
should be universally adopted.



(*Reason and Policy.* The person being deceased, no living testimony from him can be had. When, further, the circumstances indicate trustworthiness, the principle of Rule 137 (*ante*, § 950), underlying the exceptions to the hearsay rule, is fulfilled. This broad exception is an indispensable safety-valve, to relieve from the otherwise too inflexible limitations of the other exceptions).

RULE 147. Reputation. Reputation in the community is
1050 admissible [to evidence those classes of facts in which there is usually a scarcity of other and more satisfactory evidence and upon which the general and settled belief of the community is likely to have been formed after thorough discussion among persons having adequate sources of correct information; in particular,] to evidence land-boundaries and related facts, general history of the community, marriage of a couple, and individual moral character;
subject to the following details:

(*Reason and Policy.* The principle of Rule 137 (*ante*, § 950), underlying the exceptions to the hearsay rule, is here satisfied as follows: For *land-boundaries*, and *land-possession*, the lapse of years is likely to destroy the landmarks and to leave no surviving witnesses; the repute of the community, as handed down in tradition, was formed among those who have personally observed, and discussion of matters having a common interest to the neighborhood is likely to sift out inaccurate rumors. For *general history*, the same considerations apply; here the discussion takes place between skilled investigators in their writings, and the repute is handed down in written form in books of history. For *marriage*, and other events of family-history, the necessity is a marked one, in a community having no systematic, compulsory, and exhaustive records, and living also in chronic habits of migration; the repute is formed among those who have personally observed the conduct of the pair, and have had occasion to act socially and commercially on their belief. For *moral character*, the necessity lies in the dearth of other evidence, inasmuch as particular acts of conduct are largely excluded by Rules 43 and 105, and individual opinion is excluded by Rule 176; the repute is founded on discussion among those who have observed the person's conduct, and represents the net result after the sifting of inaccurate rumors.)—W. §§ 1582, 1583 (land), §§ 1597, 1598 (history), § 1602 (marriage), § 1610 (character).

ART. 1. Reputation of Land-Boundaries and Land-Customs.
1052 Reputation in the community is admissible to evidence such



§§ 1053-1060 HEARSAY EXCEPTIONS: REPUTATION

matters affecting land as are usually not evidenced by the records of title;

subject to the following details:

1053 *Par. (a).* The matter must be *ancient*, i. e. in a prior generation. — (W. § 1582.)

1054 *Par. (b).* The repute must concern a matter of general interest to the community; in particular, it may concern

(1) a boundary or custom affecting *public land*. — (W. § 1586.)

(2) or, a boundary or custom affecting *private land*, provided it affects a large number of lands in common.¹ — (W. § 1587.)

1055 [(3) or, a *possession* of land, provided the circumstances were likely to create a repute.²] — (W. § 1588.)

Distinguish the use of repute here circumstantially to evidence the *knowledge* by the other party of a claim of adverse possession, under Rule 62, Art. 9 (*ante*, § 286).

1056 (4) but not a specific *act done* on or about the land. — (W. § 1585.)

1057 (5) nor a *title* to the land. — (W. § 1587.)

1058 *Par. (c).* The repute must have existed *before controversy* on the subject. — (W. § 1588.)

1059 *Par. (d).* The repute must arise in the *community where the land is*. — (W. § 1591.)

1060 *Par. (e).* The repute must represent the opinion of the community; but it may be presented in oral statements of *deceased individuals* expressly declaring their understanding as to the repute, or in *maps, surveys, deeds, etc.*, indicating a repute. — (W. §§ 1584, 1592.)

Illustrations. (1) The statement of R, deceased, that he owned land and that the boundary of his land was the highway is not admissible; but his statement that people always believed the highway to be bounded on his land is admissible.

¹ This is the rule in the United States, though not in England.

² Not all Courts concede this.



§§ 1062-1067 HEARSAY EXCEPTIONS: REPUTATION

(2) An old survey of 1842 was then recorded, and in subsequent conveyances has been frequently referred to in descriptions of various tracts of land; this survey thus represents the accepted repute in the community.

Distinguish the use of a *survey* as a disinterested person's statement, under Rule 144 (*ante*, § 1037), or as an official's statement, under Rule 148 B (*post*, § 1131), in which uses the survey must be authenticated and the maker identified.

1062 ART. 2. *Reputation of Events of General History.* Reputation in the community is admissible to evidence matters of history in the community,
subject to the following details: — (W. § 1597.)

1063 *Par. (a).* The matter must be *ancient*, i. e. in a prior generation.¹ — (W. § 1597.)

1064 *Par. (b).* The matter must be of *general importance* in the community. — (W. § 1598.)

1065 *Par. (c).* The reputation may be presented in a *printed treatise* or *essay* generally accepted as correct. — (W. § 1598.)

Distinguish (1) the use of *scientific treatises*, under Rule 149 (*post*, § 1170), which in some respects would cover this class of evidence.

(2) the *judicial notice* of notorious facts, under Rule 230 (*post*, § 2120), which would exempt from any offer of evidence.

1066 ART. 3. *Reputation of Marriage, and other Matters of Family History.* Reputation is admissible to evidence the relation of a couple as married or not, and other important facts of family-history;
subject to the following details: — (W. § 1602.)

Distinguish (1) the use of *marital cohabitation* as circumstantial evidence, under Rule 63 (*ante*, § 293).

(2) the necessity of an *eye-witness*, as additional evidence, in certain issues, under Rule 181, Art. 3 (*post*, § 1537).

1067 *Par. (a).* The reputation may be *negative*. — (W. § 1603.)

¹ Statutes sometimes ignore this; but modern matters are taken care of by Rule 149, *post*, § 1170 (scientific treatises).



1068 [Par. (b). The reputation need not be *unanimous*.] ¹ —
(W. § 1603.)

1069 [Par. (c). The reputation may concern such facts
(besides marriage) of *family history* as are likely in the
circumstances to have given rise to a trustworthy repute;
including birth, legitimacy, death, race-ancestry.] ² —
(W. § 1065.)

Cross-reference. For *family repute* on such matters, see Rule
140 (*ante*, § 980).

ART. 4. *Reputation of Moral Character.* Reputation in
1071 the community is admissible to evidence an individual's
moral character;

subject to the following details: — (W. § 1610.)

Distinguish (1) the question when the *moral character* itself
is *relevant* and admissible, under Rules 30-33 (*ante*, §§ 130-
152) and Rule 98 (*ante*, § 518).

(2) the question when the *repute* is *in issue* by the sub-
stantive law and the pleadings, under Rule 34 (*ante*, § 153).

(3) the question when the repute is circumstantial evidence
of *some other person's notice* of the fact reputed, under Rule
62 (*ante*, § 277). — (W. §§ 1608, 1609.)

Illustrations. (1) In a trial for homicide, the prosecution
may or may not be allowed to use the defendant's character
for violence; but the reputation would be a proper mode of
evidencing that character if it were admissible.

(2) In an action for slander, the plaintiff's bad repute
may become a part of the issue, under the rule of damages
diminishing compensation according to the amount of injury
to the reputation.

(3) In an action for injury by an employee's negligence,
the plaintiff being a fellow-servant, the injuring employee's
repute as to incompetence may be circumstantially evidential
of the employer's knowledge of his actual incompetence, and
may also be admissible under the present rule as hearsay
evidence of that incompetence.

1072 *Par. (a).* The repute must be *general*, though it need
not be unanimous. — (W. § 1612.)

1073 *Par. (b).* The repute may be *negative*, *i. e.* that nothing
has been said against him. — (W. § 1614.)

¹ Courts are here divided.

² Courts are here divided; but the above rule is a practical
one, and falls within the general principle.



§§ 1074-1078 HEARSAY EXCEPTIONS: REPUTATION

Cross-reference. (1) For the testing of an *impeaching witness* on cross-examination by asking him to *name* the persons who have spoken unfavorably, see Rule 111 (*ante*, § 804).

(2) For the testing of a *supporting witness* by asking if he has not heard unfavorable rumors, see Rule 105 (*ante*, § 557).

1074 *Par. (c).* The *repute* must be among people who have had an adequate opportunity of observing the person's conduct;

in particular,

(1) in the *neighborhood* of his home. — (W. § 1615.)

Cross-reference. For the qualification of the reputation-witness, as to *knowledge* of this reputation, see Rule 87, Art. 2 (*ante* § 417).

1075 [(2) or, in the group of persons with whom he follows his *occupation* or otherwise associates intimately.]¹ — (W. § 1616.)

Illustrations. In a factory, commercial association, social club, etc.

1076 *Par. (d).* The *repute before the time* of the matter in issue is admissible, so far as the character before that time is admissible under Rule 98, Art. 2 (*ante*, § 521). — (W. § 1617.)

1077 *Par. (e).* The *repute after the time* of the matter in issue is

(1) admissible to evidence the character of a *witness* who is not a party nor equivalent to a party;

(2) but not admissible to evidence the character of a party, [[in so far as the controversy is likely to have affected the reputation unfavorably]].² — (W. § 1618.)

1078 *Par. (e).* The *kind of character* which may be evidenced by *repute* includes, besides the moral traits of a witness and a party as ordinarily involved, — (W. §§ 1620, 1621.)

(1) the *chastity* of a woman;

¹ This is not the law in most States; but it is demanded by modern conditions.

² The double-bracketed clause represents the principle, and ought to be included in the rule.



1

§§ 1079-1087 HEARSAY EXCEPTIONS: REPUTATION

Distinguish here particularly the use of repute as evidence of the actual character and as itself material under the issue, under Rule 34 (*ante*, § 163) and Rule 49, Art. 3 (*ante*, § 234).

- 1079 (2) the character of a person keeping or resorting to a *bawdy-house*, and the habitual use of such house.

Cross-reference. For such character as in issue, see Rule 34 (*ante*, § 163) and Rule 49, Art. 2 (*ante*, § 233).

- 1080 (3) the *habitual conduct* of a person charged as a common offender.

Cross-reference. For such character as in issue, see Rule 49, Art. 1 (*ante*, § 231).

- 1081 [(4) the habitual use or avoidance of intoxicating liquor;]¹

- 1082 [(5) the qualifications of a witness or a party as to skill;]²

- 1083 (6) but not a person's mental condition as to *sanity*.

- 1084 ART. 5. *Reputation of other Personal Facts.* Reputation in the community as to other personal facts than character may or may not be admitted in the circumstances of the case, as follows:

- 1085 [Par. (a). To evidence *solvency* or *wealth*, or the opposites.]³ — (W. § 1623.)

Distinguish the circumstantial use of reputation to evidence *some other person's knowledge* of solvency, under Rule 62, Art. 8 (*ante*, § 285).

- 1086 Par. (b). Not to evidence a *partnership*. — (W. § 1624.)

Distinguish here also the circumstantial use under Rule 62, Art. 10 (*ante*, § 287).

- 1087 [Par. (c). To evidence *incorporation*.]⁴ — (W. § 1625.)

¹ Courts generally deny this; but repute is worth admitting.

² This is generally denied.

³ This is conceded by the majority of Courts.

⁴ This is the rule by statute in many jurisdictions.



RULE 148. *Official Statements in general.* A statement in writing, made by a public officer, acting under a duty or authority to make the statement, and qualified by personal observation, is admissible;

subject to the provisions of this Rule and Rules 148 A-148 C.

(*Reason and Policy.* The principle of Rule 137 (*ante*, § 950), underlying the exceptions to the hearsay rule, is here satisfied as to both necessity and trustworthiness. The necessity consists in the practical impossibility of requiring the official's attendance as a witness to testify to the innumerable transactions occurring in the course of his duty and requiring to be evidenced. The diminished risk of untrustworthiness is found, first, in the sense of official duty which has led to the making of the statement; secondly, in the penalty which usually is affixed to a breach of that duty; thirdly, in the routine and disinterested origin of most of such statements (analogous to the exception for regular entries in the course of business); and fourthly, in the publicity of record, commonly found, which makes more likely the prior exposure of such errors as might have occurred.) — (W. §§ 1631, 1632.)

ART. 1. *Officer need not be Accounted for.* The statement is admissible without showing that the officer is deceased or otherwise unavailable; [[provided that the officer may by order of the trial judge be required to attend, unless where he is privileged under Rule 200 (*post*, § 1685).]]¹

ART. 2. *Nature of the Duty; Kinds of Officers.* The statement must be made by a person having a lawful duty or authority to make it; subject to the following details:— (W. § 1633.)

Par. (a). The duty or authority need not be expressly declared by statute or departmental regulation,² but may be implied from the nature of the office.

Par. (b). The officer need not be a person whose sole or main occupation is official, or who has general official duties additional to that of making the statement; but must be a person having a duty to make the statement by virtue of his occupation and not merely as a mode of providing evidence against himself.

¹ The double-bracketed clause seems a desirable addition to the law.

² The several thousand statutes on the subject are mostly unnecessary.



Illustrations. A record of marriage, made by a clergyman having a governmental duty to make it, is admissible, even though the clergyman has otherwise no official status; but a record of sales of liquor, made by an apothecary, under a statutory duty, is not admissible, because the main object of the statute is to provide a check upon the apothecary's violation of the law as to liquors.

1095 *Par. (c).* The officer may be one of a foreign sovereignty, acting under a duty imposed by the foreign law.

Illustrations. The record of a deed, kept by a Louisiana notary, is admissible in New York, even though notaries in New York have no official duty to record deeds.

Distinguish the rule that the law of the forum determines which rule of evidence shall be enforced (Rules 6, 7, *ante*, §§ 17, 21).

Cross-references. For illustrations of the application of this principle, see *post*, § 1110 (records of deeds), § 1146 (notary's certificates).

1096 *Par. (d).* The officer making the statement may be one or more subordinate officers in the staff of the officer who signs it,

provided that at least one of the persons is qualified under Art. 3, below,

and provided that a subordinate using the name or seal of the chief officer is authorized for the purpose. — (W. §§ 1633, 1635.)

1097 **ART. 3. Officer's Personal Knowledge.** The officer signing the statement (or at least one of those persons in his staff who act for him under *Par. (d)* of Art. 2, above) must be qualified by personal observation, like other witnesses under Rule 86, Art. 5 (*ante*, § 405), except so far as expressly otherwise provided in the ensuing rules. — (W. § 1635.)

1098 **ART. 4. Classes of Documents.** The various kinds of official statements are classified, with reference to the foregoing principles, into three groups,

- A. Registers and Records;
- B. Returns and Reports;
- C. Certificates. — (W. § 1637.)



A. A *register* or *record* is a series of entries on related subjects, made in a single continuous volume or series of volumes, and kept in official custody.

B. A *return* or *report* is a single separate document, made as occasion arises, and kept in official custody.

C. A *certificate* is a single separate document, not kept in official custody, but made and given out on each occasion to the person applying for it.

The ensuing rules apply to the various documents thus defined, regardless of the term applied by custom to the particular document.

1100 RULE 148 A. *Registers and Records.* Wherever there is a duty for an officer to do or observe a thing, there is implied in law a duty to make a record of what is done or observed, and the record is admissible, except as otherwise herein provided.¹ — (W. § 1639.)

Sundry Illustrations. The records of a county treasurer, a Federal lighthousekeeper, a State surveyor, a city auditor, etc.

1101 ART. 1. *Assessor's Record.* An assessor's record of property assessed is admissible to show the [ownership,]² occupancy, [location, and value]³ of the property. — (W. § 1640.)

Distinguish the use of such books as against the assessee only; on the principle that they embody his admissions made in his sworn and filed statement (Rule 118, *ante*, § 641).

1102 [ART. 2. *Ship's Log-book.* The log-book kept by the officer of a ship is admissible to evidence the matters required by law to be recorded.]⁴ — (W. § 1641.)

1103 ART. 3. *Register of Marriage, Birth, and Death.* A record of marriages, births, or deaths, kept by an officer having

¹ Almost all the specific statutes on this subject are superfluous. The Code of California has hardly any provision except the general one.

² Courts differ on these points; the real doubt arises from the principle of Rule 148, Art. 3 (*ante*, § 1097).

³ This is not generally conceded, except under the Federal statute; but it might well be.



the duty, or by any other person expressly by law so authorized, is admissible to evidence the matters required to be recorded;

subject to the following details (W. §§ 1642-1644):

1104 *Par. (a).* So far as the record is based on the *report of another person*, that report must be one required by law to be made by him.¹

1105 *Par. (b).* So far as the record states facts which are not within the *personal knowledge* of the recording officer, it is admissible to evidence [any facts required to be reported by others to him or customarily so reported and entered.]²

Illustrations. The town-clerk's record of the birth, date and the sex of a child, made on the report of a parent as required by law, is admissible. The clerk's record of the time and the cause of a death, reported by a physician, and the clerk's record of the names of persons married, reported by a clergyman who performed the ceremony but had never before seen the parties, is admissible.

1106 *Par. (c).* A *certificate of marriage*, given out to the parties by the person performing the ceremony, [is admissible if a record kept by the same person, or by another official on his report, would be admissible.]³— (W. § 1645.)

Distinguish the admissibility of a *certified copy* of a record of marriage; this is also but improperly called a certificate, and would in any case be admissible under Rule 149 C, Art. 6 (*post*, § 1152).

Cross-references. (1) For the *authentication* of a certificate, see Rule 193 (*post*, § 1633).

(2) For the admissibility of a marriage register under the exception for *regular entries*, even though not receivable under the present exception, see Rule 1, Art. 143 (*ante*, § 1022).

(3) For the use of a *certificate* acted upon by a deceased family member and thus becoming admissible under the exception for statements about family-history, see Rule 140, Art. 4 (*ante*, § 992).

¹ *I. e.* in order to obtain somewhere in the record some one's personal knowledge, under Rule 148, Art. 3 (*ante*, § 1097).

² There is much uncertainty in the rulings. The above seems a practical rule.

³ There is some dissent and much confusion on this subject; but for our communities this seems the only practicable rule.

1 the 6
1 6

ART. 4. *Register of Ships.* A register of ships, in so far as
1107 it is based merely on the filed statement of a person claiming
to be owner, is not admissible.

Distinguish its use against the declarant, as embodying his
admission, under Rule 118 (*ante*, § 641).

ART. 5. *Register of Conveyances.* A register of conveyances,
1110 kept by an officer authorized to record conveyances, is
admissible to prove the contents and the execution of a
recorded conveyance which

(1) is of a class authorized to be recorded, and

(2) has been recorded as prescribed by law;

subject to the following details: — (W. §§ 1648-1651.)

[*Par. (a).* If the register is kept in *another jurisdiction*,
1111 the due authority for keeping it is determined by the law
of that jurisdiction.]¹ — (W. § 1652.)

Par. (b). . If the registry law does not provide for
1112 recording any proper testimony to the *execution* of docu-
ments, the register is [not] admissible to evidence the
contents only.² — (W. § 1653.)

Par. (c). If the register of a specific document does not
1113 fulfil the requirements as to testimony of *execution*, it is
still admissible to evidence the document's contents, if
its execution is *otherwise evidenced*. — (W. § 1653.)

Par. (d). The requirement of some testimony of execu-
1114 tion to be recorded is sufficient when it consists in ³

(1) a certificate of *acknowledgment* of execution by
the maker of the document before the recording officer,
or before some separate officer, such as a notary, a
mayor, or other officer, domestic or foreign, as provided
by the registry law;

(2) or, a certificate of *probate* of execution, by one or
more witnesses attesting the fact of execution in their
presence or the genuineness of handwriting (if the

¹ There is here little authority, and not harmonious.

² There is difference of rulings on this point; the "not" is unsound.

³ The different States here vary somewhat.



maker is deceased), or otherwise as provided by the registry law. — (W. § 1653.)

1115 *Par. (e).* If the *original document* of conveyance is produced, the register may still be used to evidence the document's execution. — (W. § 1653.)

Cross-reference. Whether the original document *must* be produced, is determined by Rule 126, Art. 11 (*ante*, § 781).

1116 *Par. (f).* Wherever the register itself would be admissible for any purpose,

(1) its *production* is excused, under Rule 126, Art. 9 (*ante*, § 779);¹ and

(2) a *certified copy* of it is admissible, under Rule 148 C, Art. 8 (*post*, § 1161);¹ or

(3) a *sworn copy* of it is admissible, under Rule 128 (*ante*, §§ 820-835).² — (W. § 1655.)

Cross-reference. (1) Whether the original *certificate of execution*, on the deed itself, can be used to evidence execution, where the original deed is produced and not the register nor a copy of the register, is determined by Rule 148 C, Art. 2 (*post*, § 1147).

(2) What sort of *seal*, or other means, suffices to *authenticate a certified copy*, is determined by Rule 193 (*post*, § 1633).

1117 ART. 6. *Register of Assignment of Patent.* A register of assignments of patents of invention [is admissible under the same principles as provided in Art. 5 for other conveyances.] — (W. § 1657.)

1118 ART. 7. *Register of Wills.* The judicial record of a will, made in a court having authority to probate it, is a judgment conclusive of the subject adjudicated. It is provable under Rule 126, Art. 8, (*ante*, § 778) without producing the original, and under Rule 148 C, Art. 7 (*post*, § 1160) by a certified copy. — (W. § 1658.)

1119 ART. 8. *Register of Government Land-Office.* The register of patents of land, scrip, and the like, in the office having

¹ The statutes invariably enact in the same section these three results, *i. e.* of the present rule and the two above cited.

² The statutes usually do not cover this point.

³ This point has not yet been settled.

charge of grants of government land, is by substantive law either an original constitutive document of title, or a record of original documents of title. If it is the latter, the record (or a copy) is admissible under the present Rule, Art. 5. — (W. § 1659.)

Cross-reference. The chief question here, depending on the above two theories of the title, is whether the *original patent* etc., *must be produced* or accounted for under Rule 126, Art. 11 (*ante*, § 781) and Art. 16 (*ante*, § 791).

1120 ART. 9. *Judicial Records.* A judicial record is a judgment, ending a controversy and requiring enforcement without re-inquiry in another court, according to the law of judgments. It is provable under Rule 126, Art. 8 (*ante*, § 778) without producing the original, and under Rule 148 C, Art. 7 (*post*, § 1160) by a certified copy. — (W. § 1660.)

1121 ART. 10. *Corporate Records.* The records of a corporation private or public, are admissible in the following ways:¹ — (W. § 1661.)

Par. (a). The records of the *proceedings of a meeting* of a *private* corporation are receivable [either under Rule 142 (*ante*, § 1002) as regular entries in the course of business, or] under Rule 218 (*post*, § 1944) as the exclusive memorial of the proceedings, according to the principle accepted by the substantive law. But if the corporation is a *public* one, the records are receivable under the present Rule without calling as a witness the officer making them, and their contents are provable under Rule 126, Art. 9 (*ante*, § 779) without producing the record itself, and under Rule 148 C, Art. 6 (*post*, § 1152) by a certified copy.

1122 *Par. (b).* The records of the *acts* done by the corporation or its officers are receivable, [if of a private corporation, as regular entries in the course of business, or,] if of a public corporation, as official statements, under the Rules mentioned in *Par. (a)*, above.

¹ There is much looseness and confusion here in the precedents; and statutes often enter.

1123 *Par. (c).* The records of a *private* corporation are further admissible against parties privy to their contents, under Rule 119, Art. 4 (*ante*, § 671), governing parties' admissions.

1124 ART. 11. *Legislative Records.* The records of a Legislature are admissible as follows:— (W. § 1662.)

Par. (a). The *journals* of proceedings are admissible as official statements, under the present Rule, without calling as a witness the officer making them.

Cross-references. (1) Whether they are *conclusive*, or can be used to correct the enrolled act, is determined by Rule 133, Art. 3 (*ante*, § 903).

(2) Whether they are provable by *printed copy* is determined by Rule 148 C, Art. 10 (*post*, § 1164).

1125 *Par. (b).* The *recitals* in a *public* act are admissible, under the present Rule, [unless it appears that the principle of Rule 148, Art. 3 (*ante*, § 1012), requiring adequate means of information, is substantially not fulfilled].¹

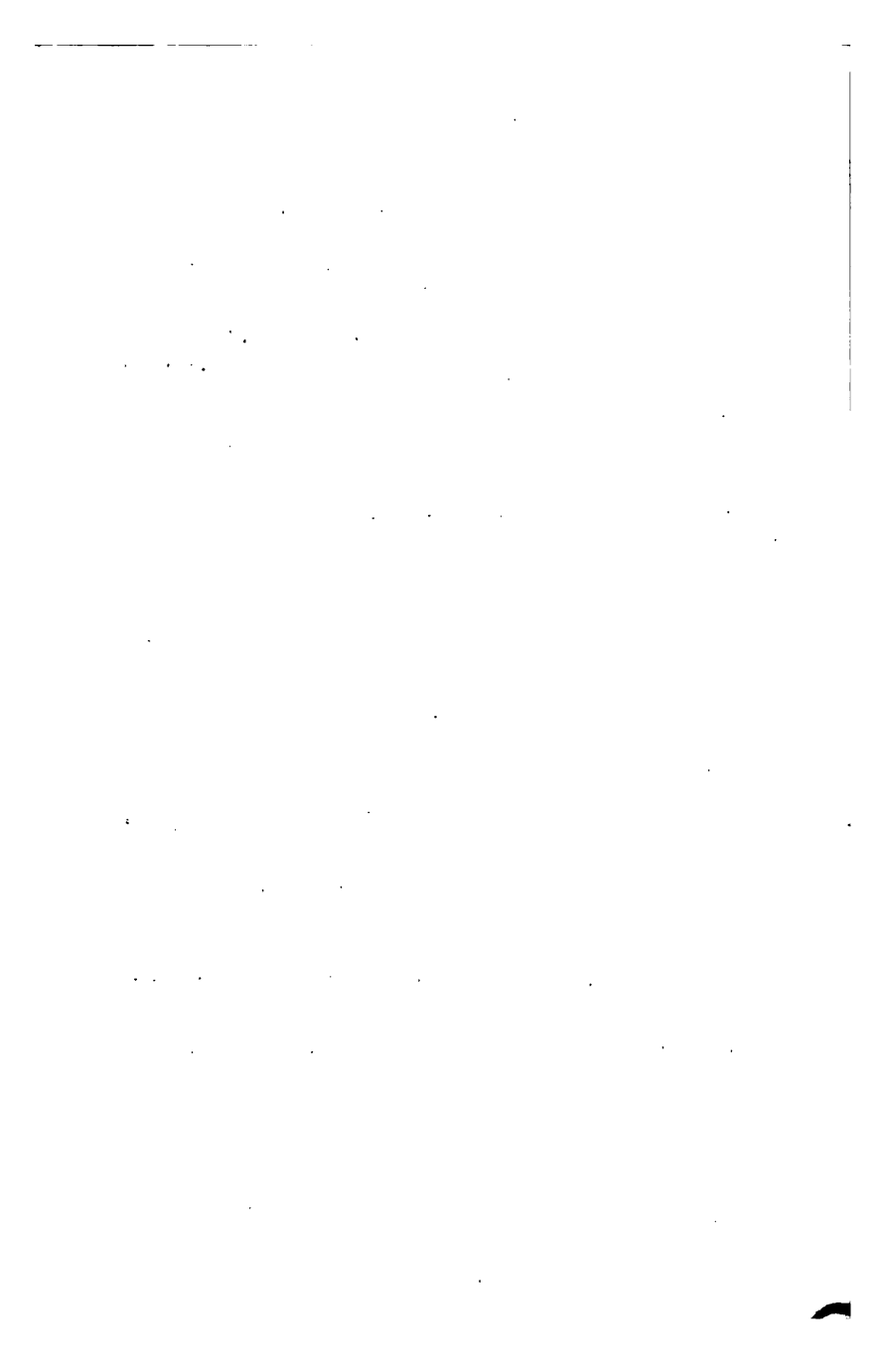
1130 RULE 148 B. *Returns and Reports.* A return or report (as defined in Rule 148, Art. 4, *ante*, § 1098) is admissible, subject to the ensuing details, on these conditions:

(1) Whenever the duties of an officer require him, while within or *without the premises* of his office, to *do* or *observe* something, he has an *implied* authority, on returning to the official premises, to write down what he did or observed, and this written statement is admissible.

(2) Whenever the duties of an officer require him to obtain information *other than by personal observation* (under Rule 148, Art. 3, *ante*, § 1093), his return or report is admissible only when he had *express* authority, by legislative enactment or by executive command, to make it upon such information.²
— (W. §§ 1664, 1670, 1672.)

¹ The precedents are uncertain; the above seems a fair compromise.

² This seems to be the effect of the precedents, which however do not furnish so broad a statement.



ART. 1. *Sheriff's Returns and Recitals.* A sheriff's return
1131 of acts done by him under the duties of his office is admissible.
— (W. § 1664.)

Distinguish the *conclusiveness* of the return, as against the parties, by the law of judgments.

1132 *Par. (a).* The *recitals* in a sheriff's deed as to the contents of the judgment authorizing the sale on execution, are [not] admissible.¹ — (W. § 1664.)

Cross-reference. Whether the *whole* of the record of judgment, etc., must be evidenced, is determined by Rule 184 (*post*, § 1561).

ART. 2. *Surveyor's Return (Map, etc.).* A surveyor's return,
1133 in the form of a description or map, of the location of lines, landmarks, and other things done or seen by him in the course of his duty, is admissible. — (W. § 1665.)

Distinguish the other hearsay exceptions affecting *boundaries* and the like (Rule 144, *ante*, § 1035; Rule 147, *ante*, § 1050).

ART. 3. *Report of Testimony.* The report of testimony at
1134 a trial, made by a person authorized thereto, is admissible.

In particular:

1136 *Par. (a).* The *notes* taken by a *judge* of a superior court are not admissible. — (W. § 1666.)

1137 *Par. (b).* A *committing magistrate's* report, when made under a duty to report the whole, is [not] admissible.² — (W. § 1667.)

Cross-reference. For the rules *preferring* the magistrate's report to other evidence, see Rules 131 and 133 (*ante*, §§ 890, 900).

Distinctions. (1) A report not admissible under this Rule may be used as a record of recollection under Rules 89 or 90 (*ante*, §§ 431, 444).

(2) A report not admissible under this Rule may be received as an *admission* or *self-contradiction*, if it was assented to as correct by the accused or witness. — (W. § 1667.)

¹ This was not so at common law; but statutes have usually eliminated the "not."

² A majority of Courts properly admit this.



(1) Whenever an *express* authority, by legislative enactment or by executive command, has been given to an officer to prepare and deliver out a certificate of something done or observed by him in his office, this certificate is admissible.¹ — (W. § 1674.)

Illustrations. The vast majority of certificates are governed by this rule, — prison-discharge, army-discharge, auditor's account, grain-inspection, land-office, factory-inspection, etc.

(2) There is no *implied* authority in an officer to deliver out a certificate, except as stated in the ensuing articles. — (W. § 1674.)

(3) Whenever the certificate concerns an act done to or in some document not retained in the officer's custody (deed, note, affidavit), the certificate must be *attached* to the document.²

Par. (a). The certificate itself will be *authenticated*, as to genuineness, according to the general provisions applicable to the authentication of official documents, under Rule 193 (*post*, § 1633).

Wherever by that Rule an officer's certificate does not authenticate itself by seal alone, but the annexed certificate of another officer authenticates itself by seal alone, the second officer hereby is given an implied authority under the present Rule to certify to the genuineness of the first officer's seal and certificate.

In particular,

1. For a document, *not a judicial record*, coming from any part of the *United States*, the second officer may be

the Secretary of State,
or, the judge of a court of record,
or, the mayor of a city.³

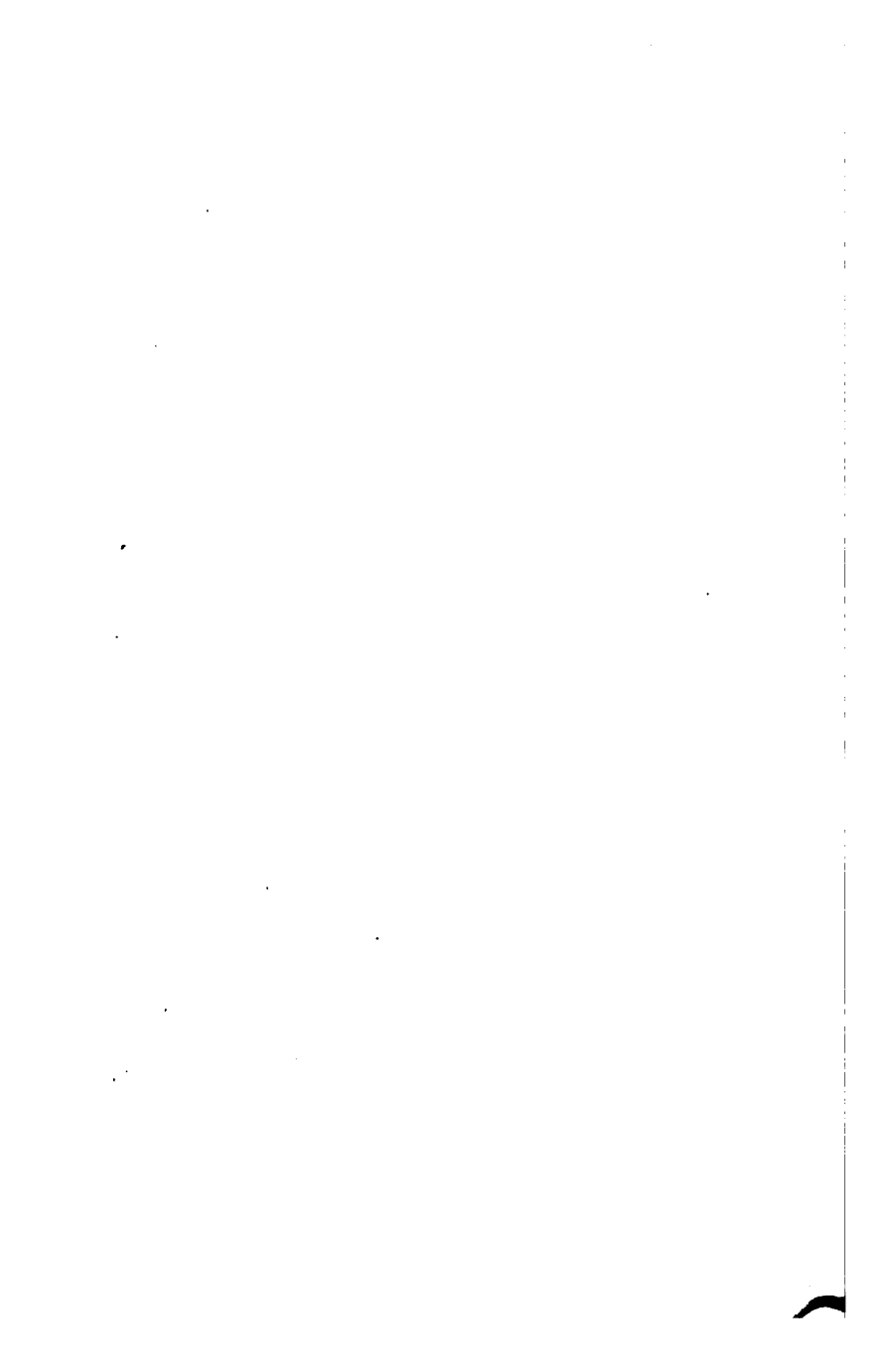
2. For a document, *not a judicial record*, coming from a *foreign country*, the second officer may be

the Secretary of State,
or, a United States diplomatic or consular officer.³

¹ There are here several hundred statutes. For creating the duty, they are necessary; for securing admissibility, they are not.

² This represents the practice and is expressly stated in many statutes.

³ See Note 1, next page.



3. For a document, *being a judicial record*, the second officer may be

the chief judge, if in the United States, or, the chief judge and a United States diplomatic or consular officer, if in a foreign country.¹

4. For a document, *not a judicial record*, coming from any part of the United States, the second officer may be the Secretary of State or the Governor

or, the presiding justice of the jurisdiction together with the clerk of his court.¹

5. For a document, *being a judicial record*, coming from any part of the United States, the second officer may be the judge, chief justice, or presiding magistrate.¹

1146 ART. 1. *Notary's Certificate for Commercial Paper.* A notary's or other officer's certificate of matters relating to the negotiation of a negotiable instrument is admissible, to the extent that the facts stated are within the scope of his duty as defined by custom or statute;

in particular, to the facts of presentment, demand, refusal to accept or to pay, [mode of notifying the parties, and residence of the parties; whether the instrument be a bill, note, or check, and whether it be inland or foreign].² — (W. § 1675.)

Cross-reference. For authentication by seal of the notary, see Rule 193, Art. 4 (*post*, § 1640).

1147 ART. 2. *Certificate of Execution of Deeds.* The certificate of an officer authorized to witness the maker's acknowledgment of the execution of a deed, will, or other instrument of conveyance is admissible to evidence that fact, as follows:

Par. (a). Where the instrument is one entitled to be recorded, and has been recorded upon the fulfilment of the

¹ Clauses 1, 2, and 3 represent the substance of the rule under the California Code; Clauses 4 and 5, under the Federal statute. There are numerous other varieties of rule, in different States, mostly made by patchwork for different classes of documents. Some simple, uniform, and flexible rule like that of the California Code, applied without technicality, is the desideratum.

² By statute in most States the rule has been extended to include the scope of the bracketed clause.



requisites thereto, the certificate of acknowledgment is admissible to evidence the execution of the original instrument.¹ — (W. § 1676, par. (1).)

Par. (b). Where the instrument

- 1148 (1) is one *not entitled* to be recorded,
 (2) or, is one entitled to be but *not actually* recorded,
 the certificate is not admissible, unless express authority has been given to certify to such acknowledgments otherwise than for the purpose of recording.² — (W. § 1676, par. (2).)

Cross-reference. For the rule here applicable where a *foreign law* authorizes such certificates, see Rule 148, Art. 2 (*ante*, § 1092).

- ART. 3. *Certificate of Oath.* The certificate of an officer
 1149 authorized to administer an oath (affidavit, deposition) is admissible. — (W. § 1676, par. (3).)

- ART. 4. *Certificate of Marriage, etc.* A certificate of marriage, birth, or death, is admissible as provided in Rule 148 A, Art. 3 (*ante*, § 1103).

- ART. 5. *Postmark.* A postal-officer's stamp on matter
 1151 passing through the mail is admissible to evidence the time and the place of stamping. — (W. § 2152.)

Cross-reference. For the presumed *genuineness* of a postmark, see Rule 191, Art. 2 (*post*, § 1624).

- ART. 6. *Certified Copy, in general.* The official custodian
 1152 of a document has an implied authority to make a copy and to certify its correctness by certificate delivered to an applicant; and such certificate is admissible to evidence the matters within his authority of office;
 subject to the following details:³ — (W. §§ 1677, 1680.)

¹ This is a universal implication from the recording system.

² A majority of States now have some such statutory provisions, but usually except from their scope wills and negotiable instruments.

³ This was not the English common law, but is in general the American common law. Nevertheless, several thousand statutes (following an early legislative custom caused by the English rule) now superfluously provide admissibility for specific classes of documents.

1153 *Par. (a).* The certificate is admissible to evidence the contents

(1) of all *official records* or other documents there lawfully preserved, whether originating there or in another office;

(2) and of all *private* documents lawfully filed or deposited there;
and of those only.

1154 *Par. (b).* The certificate is admissible to evidence the genuineness ((execution)

(1) of all such *official documents*;

(2) but not of such *private* documents, originating without the office, [unless required by law, before being placed in official custody, to be executed before some other officer and to bear his certificate of execution.]¹
— (W. § 1677, par. (2).)

1155 *Par. (c).* The certificate must purport to give a *literal copy* of the original;

unless the custodian is entitled to state only the *substance* or *effect* of the original,

(1) either by *express authority*, under legislative statute or executive command,

[(2) or by the determination of the trial Court under the circumstances.]² — (W. § 1678, par. 4.)

Cross-reference. Whether the *whole*, or a *part merely*, may be copied, is a different question, depending on Rule 184, Art. 3 (*post*, § 1658).

1156 *Par. (d).* A certificate that a document or entry of a specific tenor *cannot be found*, after diligent search, in the custody of the officer, is [not] admissible.³ — (W. § 1678, par. (5).)

¹ Here there is much haziness in the precedents; the above rule is required by principle, by the analogy of deeds, etc., and by practical safety.

² Numerous statutes give such authority; but the Court ought to give further elasticity when needed, as provided in the bracketed clause.

³ The affirmative is not the common law, but ought to have been. Some States have so provided by statute.

Distinguish the question arising under Rule 126, Art. 19 (*ante*, § 794), whether a *witness on the stand* can testify to the non-existence of a record or entry *without producing* the entire files.

1157 *Par. (e).* The certified copy may be used without *producing the original*, as provided in Rule 126 (*ante*, § 747).

1158 *Par. (f).* The certified copy must itself be *authenticated* (as to genuineness) by the custodian's *seal*, or when that does not suffice, by the *further certificate* of another officer, or otherwise, as provided in *Par. a*, Rule 148C (*supra*, § 1145) and in Rule 193 (*post*, § 1633). — (W. § 1679.)

1160 ART. 7. *Certified Copy of Judicial Record.* The clerk of the court having custody of a judicial record has implied authority to certify to the existence and contents of the record, and such certificate is admissible.¹ — (W. § 1681.)

Cross-reference. For *authentication* by seal, etc., see Rule 193 (*post*, § 1633) and § 1145, *supra*. Art. 7 is merely an application of Art. 6; but the class of records in Art. 6 would be authenticated by a different kind of seal or additional certificate.

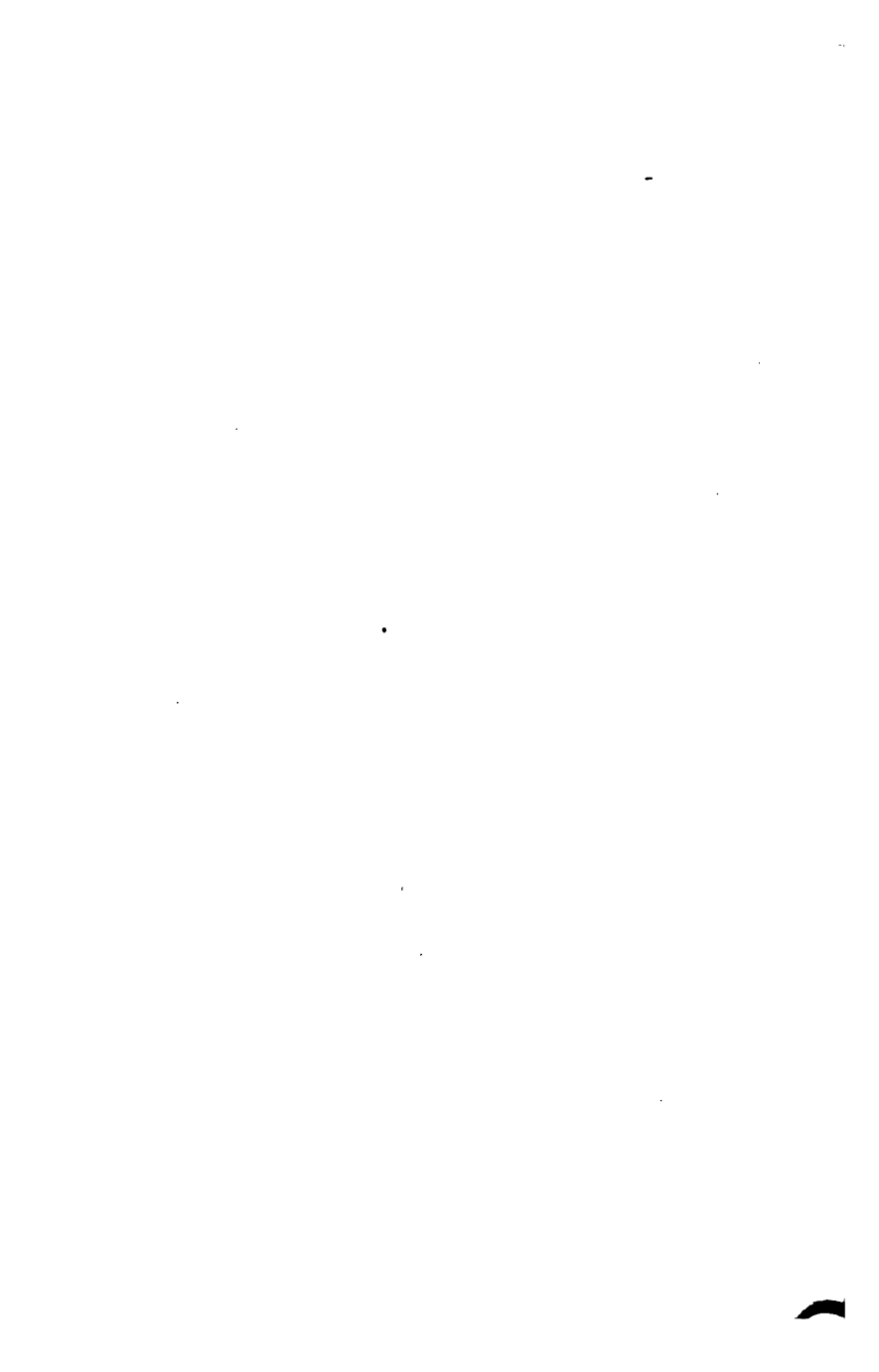
1161 ART. 8. *Certified Copy of Recorded Deed.* The officer having custody of a register of deeds or other instruments of conveyance has authority to certify a copy of the record of any instrument lawfully recorded, and such certificate is admissible. — (W. § 1682.)

1162 *Par. (a).* The certificate is admissible to evidence the *execution*, and other matters concerning the instrument, in so far as the register itself would be admissible to evidence them, under Rule 148 A, Art. 5 (*ante*, § 1110).

Cross-reference. For *authentication* by seal, etc., see Rule 193 (*post*, § 1633) and § 1145 (*supra*).

1163 [ART. 9. *Certified Copies of Private Record.* The custodian of a private person's record (*e. g.* church records, corporation records) has authority to certify a copy, if the record is one which need not itself be produced under Rule 126, Art. 10

¹ This was not common law in England, but is in the United States. Statutes also everywhere so provide.



(*ante*, § 780), and if it is accessible to all parties interested for the purpose of verifying the copy.]¹ — (W. § 1683.)

ART. 10. *Officially Printed Copy.* A printed copy of [a
1164 public record, or of a document lawfully on file in a public office,]² is admissible if it was printed

(1) by an *official printer* of the State;

(2) or, in an *official periodical* exclusively containing public records;

(3) or, by a *private printer expressly authorized* by the officer having power to publish.³ — (W. § 1684.)

Cross-reference. (1) For the presumption of *genuineness* of such copies, see Rule 193 (*post*, § 1644).

(2) For the admissibility of *privately printed copies* of decisions and statutes, see Rule 151, Art. 1 (*post*, § 1181).

(3) For the *production of the original*, instead of using a copy, see Rule 126, Art. 9 (*ante*, § 779).

RULE 149. *Scientific Treatises.* A treatise or essay on a
1170 subject of science or art, composed by a person expert in the science or art, is admissible;

subject to the following provisions:⁴ — (W. §§ 1690-1693, § 1696.)

(*Reason and Policy.* The fundamental considerations underlying the exceptions to the hearsay rule (Rule 137, *ante*, § 950) are here satisfied. There is a necessity, because the most authoritative writers on scientific subjects can rarely be obtained in person on the witness-stand, either because they live without the jurisdiction, or because the relative expense of obtaining them could be great. There is a diminished risk of untrustworthiness, because the publication was made for scientific purposes, free from motives affecting the

¹ A number of statutes admit copies, so certified, of specific classes of records. For the purpose of a general rule, the above limitations seem desirable.

² The statutes here usually name only legislative acts and municipal ordinances; but some are as broad as above stated.

³ Under Clause (3) numerous statutes expressly make such copies admissible, but that is superfluous.

⁴ The exception in this broad form is recognized in a few jurisdictions only; but it should be extended. So far as there is such an exception universally recognized for specific subjects, these are noted in Art. 2, below.

litigation in hand, and subject to refutation by the criticism of other scientists. And the writer is qualified as a witness in his subject.)

[ART. 1. *Approval by Expert Witness.* The trustworthiness
1171 of the treatise or essay must first be evidenced by a witness on the stand, expert in the subject, who will testify

(1) that the writer is approved in his profession as expert in the subject;

(2) and that the passages to be offered in evidence would be relied upon by the witness himself.]¹ — (W. § 1694.)

ART. 2. *Subject of the Evidence.* The subject of the evi-
1172 dence thus offered may be [any topic of science or art on which an expert witness could testify on the stand;]² in particular,

1173 *Par. (a).* A matter of *foreign law*. — (W. § 1697.)

Cross-reference. (1) Whether a foreign *statute* must be evidenced by a *copy*, depends on Rule 128, Art. 6 (*ante*, § 826).

(2) Whether a *witness* to foreign law is *qualified*, depends on Rule 83, Art. 3 (*ante*, § 381).

(3) Whether *opinion* on foreign law is admissible, depends on Rule 173, Art. 1 (*post*, § 1447).

1174 *Par. (b).* *Statistical* or *mathematical* data, as contained in computations in an *almanac*, a *mortality-table*, or the like. — (W. § 1698.)

1175 *Par. (c).* Definitions given in *dictionaries* and similar works of reference. — (W. § 1699.)

Cross-reference. (1) For the *judicial notice* of such facts, without evidence, see Rule 230 (*post*, § 2135).

(2) For the use of treatises embodying reputation on *matters of general history*, see Rule 147, Art. 2 (*ante*, § 1062).

1176 *Par. (d).* In the foregoing specific classes, the authority of the specific treatise as a standard one may be noticed by the Court without calling a witness to approve it under Art. 1 above.

¹ This is an amplification of the principle applied by the few Courts recognizing the rule.

² The bracketed clause represents the broad rule as it ought to be, but only a few jurisdictions so accept it.



ART. 3. *Use of Treatises by Counsel.* The counsel, on 1177 cross-examination of an expert witness, may not quote the writings of another expert,¹

[(1) unless such writing has already been approved as in Art. 1, above];

(2) or, unless the cross-examined witness has in his direct or cross-testimony referred to the writing in support and it is desired to contradict him by showing that he has cited incorrectly. — (W. § 1700.)

RULE 150. *Commercial and Professional Lists, Registers,* 1180 *and Reports.* A list, register, or report, containing data of general interest to some commercial, industrial, or professional occupation, and compiled and published for use therein, is admissible [whenever the compilation is approved by a qualified witness as one of standard reference in the occupation and one on which he would himself rely; and in particular]² when it is one of the following classes: — (W. §§ 1702, 1706.)

(*Reason and Policy.* The fundamental considerations underlying the exceptions to the hearsay rule (Rule 137, *ante*, § 950) are here fulfilled. There is a necessity, in that the expense and delay of calling or accounting for the compilers would involve inordinate inconvenience. There is diminished risk of untrustworthiness, because the compilation is made for use in the occupation, without motives for deception, and is actually relied upon in the occupation as trustworthy.)

Illustrations. Name-directory, stud-book, shipping-register.

ART. 1. *Statutes and Judicial Decisions.* A printed copy 1181 of a judicial decision or a legislative enactment is admissible, [when it is contained in a volume of an edition circulated for the use of the legal profession, and (if it concerns the law of another jurisdiction) commonly admitted in the courts thereof.]³ — (W. §§ 1684, 1703.)

¹ The majority of Courts now observe this; and it would be equally proper under the broad rule recommended as Rule 149, if the bracketed clause be added.

² The clause in brackets is probably not law in this broad form, but might well be.

³ This is generally covered by statute, but without the first half of the bracketed clause. The statutes vary slightly, and seldom cover all the above points.



1182 ART. 2. *Price-Lists and Market Reports.* A printed report of current sales, shipments, or other transactions done or offered in the open market, is admissible, if published in the usual course of trade and indorsed by a qualified witness as trustworthy.¹ — (W. § 1704.)

1183 [ART. 3. *Abstracts of Title.* A set of abstracts, copies, minutes, or extracts of title-deeds or records thereof is admissible, in place of the record or deeds themselves, provided

(1) the official records of such deeds are destroyed,

(2) and the abstracts, etc., were fairly made, before the destruction of the records, by a person in the ordinary course of business,

(3) and a substantial part of the relevant records is contained therein.]² — (W. § 1705.)

1184 Par. (a). Such documents may be evidenced by a copy, under Rule 126, Art. 10 (*ante*, § 780), when an opportunity has been given to the opponent to verify its correctness.

1186 RULE 151. *Affidavits.* A statement made under oath, but not subject to confrontation and cross-examination by the opponent according to Rules 135, 136 (*ante*, §§ 913, 928), is not admissible, except as herein provided. — (W. § 1708.)

Distinguish the use of affidavits in proceedings *interlocutory* to a main issue, and in proceedings where only *one party* is heard, and in other proceedings not covered by the present Code as limited in Rule 4 (*ante*, § 8).

(*Reason and Policy.* The vital element in the prohibition of hearsay assertions is the lack of subsection to cross-examination; hence the administration of an oath does not suffice to supply that safeguard. But the fundamental considerations (Rule 137, *ante*, § 950) underlying all the exceptions to the hearsay rule are sometimes here also fulfilled. There are certain classes of cases in which serious, frequent, and needless inconvenience would be caused by calling the

¹ This represents the substance of what has been usually conceded so far as the question has been decided.

² Statutes so provide in a number of States.



§§ 1187-1193 HEARSAY EXCEPTIONS: AFFIDAVITS

witness to the stand, and in which experience shows that there is little reason to fear false testimony. These classes are represented in Art. 1; the necessary judicial discretion to extend the exception, when needed, is given by Art. 2.)

[ART. 1. *Sundry Exceptions.* In the following classes of
1187 cases an affidavit is admissible to evidence the fact named:¹ —
(W. § 1710.)

Par. (a) the publication of a printed notice;

1188 *Par. (b) the service of a process or a notice;*

1189 *Par. (c) the official analysis of a food or a fertilizer;*

1190 *Par. (d) the transcription of stenographic notes;*

1191 *Par. (e) the translation of foreign testimony;*

Par. (f) the inventory of an executor or adminis-
1191a *trator].*

[ART. 2. *Facts not Disputed, etc.* The trial Court may
1192 admit an affidavit to evidence

(1) any fact as to which there is *no bona fide dispute*;

(2) any other fact as to which the Court finds it reasonably
necessary or useful.]]² — (W. § 1380, n. 3.)

[ART. 3. *Judicial Discretion; Right of Cross-examination.*
1193 Where an affidavit has been admitted under the foregoing
rules, the affiant may afterwards be caused to attend for cross-
examination

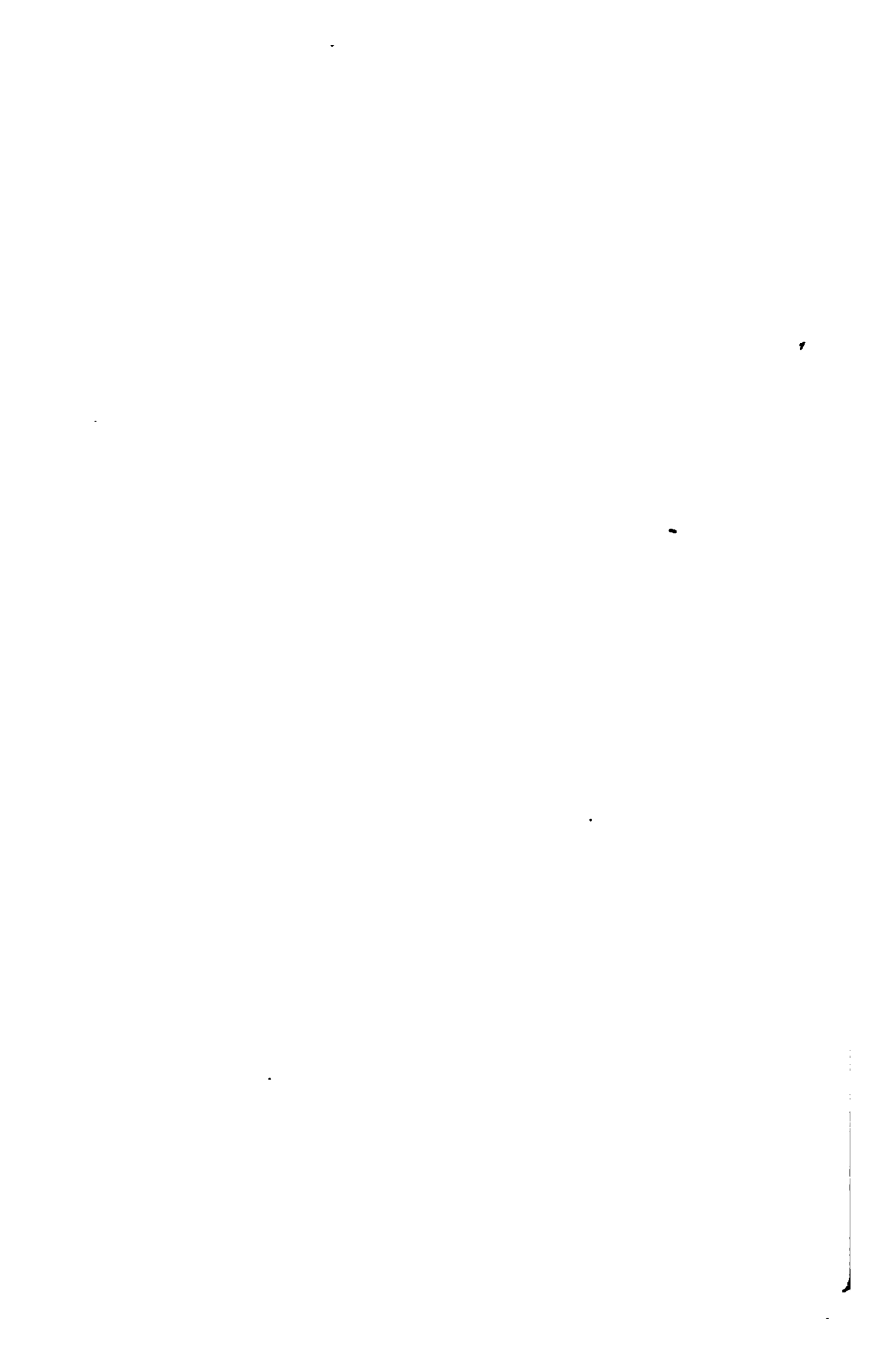
(1) in any case, in the trial Court's discretion;

(2) in all cases under Art. 2, clause (2), on motion by the
opponent]].³

¹ Every State has some statutes of this sort; the following paragraphs enumerate the more common ones.

² This is not law now in the United States; but the equivalent has been law in England for thirty-five years.

³ This is not law in the United States; but it is a part of the modern flexible procedure in England, and something of the kind is needed by us.



RULE 152. *Voter's Statements.* A statement of a voter as
1195 to his qualifications, domicile, vote, or intent to vote, is not
admissible, except as follows: — (W. §§ 1712, 1713.)

(*Reason and Policy.* The fundamental reasons (Rule 137, ante, § 950) underlying the exceptions to the hearsay rule do not here obtain. In a contested election, there is no more serious inconvenience in obtaining the voter as a witness on the stand than in obtaining witnesses to his extra-judicial statements. Moreover, amidst the general and partisan gossip that accompanies such controversies, there is no diminution of the ordinary risk of untrustworthiness, but rather an increase.)

ART. 1. *Qualifications; Domicil.* (1) A voter's extra-
1196 judicial statement of his *intent*, as affecting domicile and thus
his qualification, is admissible under Rule 153, Art. 2 (*post*,
§ 1207), and not otherwise.

(2) A voter's extra-judicial statement as to *any other fact*
affecting his qualifications is [not] receivable as an admission
of a party or privy under Rule 115 (*ante*, § 630), except
where he is a formal party to the record.¹

ART. 2. *Tenor of Vote.* A voter's extra-judicial statement
1197 as to the *tenor* of his vote is not admissible.

Cross-reference. For the voter's *privilege* on the stand not to
disclose his vote, see Rule 201, Art. 6 (*post*, § 1700).

ART. 3. *Intent of Vote.* A voter's extra-judicial statement
1198 as to the *intent* of his vote is not admissible.

Cross-reference. The admissibility of the voter's *testimony*
on the stand to the tenor of his vote, depends on the rule
against parol evidence (Rule 218, Art. 1, *post*, § 1945).

RULE 153. *Statements of Physical Sensation or Mental Con-*
1200 *dition.* A person's extra-judicial statement as to his physical
sensation or mental condition is admissible, without calling
him to the stand or accounting for his absence;
subject to the following provisions: — (W. §§ 1714-1716.)

¹ The affirmative rule is accepted in England and in some
States.

(*Reason and Policy.* The fundamental considerations (Rule 137, *ante*, § 950) underlying the exceptions to the hearsay rule are here fulfilled. There is a necessity, because a person's physical sensation and mental condition are invisible to others, and the circumstantial evidence of them is often scanty. There is a diminished risk of untrustworthiness, relatively, because testimony given on the stand, after a lapse of time and the excitement of controversy, is likely to be inferior in value to the prior extra-judicial statements.)

1201 ART. 1. *Statements of Physical Sensation.* A person's statement of a physical sensation then existing, including a statement of pain, is admissible;

with the following distinctions and limitations:— (W. § 1718.)

Distinctions. Any statement not admissible under the present Rule may be admissible in some other aspect:

(1) By Rule 86, Art. 2 (*ante*, § 402) and Rule 106, Art. 2 (*ante*, § 561) a physician may be examined as to the *grounds of his opinion*, and in giving them the conduct and perhaps the utterances of the patient, as observed by the physician, may be stated.

(2) A *party's statement* as to health, etc., may always be offered against him or his privies as an *admission*, under Rules 115, 121 (*ante*, §§ 630, 691).

(3) A person's conduct or utterance *circumstantially* evidencing his state of mind as to *knowledge* of his physical condition may be admissible under Rule 63 (*ante*, § 290).

1202 Par. (a). A statement of *present pain* or other sensation is admissible

[(1) whether made to a physician for treatment or to any other person].¹

[(2) only when made to a *physician* for treatment; except that an inarticulate exclamation of pain made in the presence of any person is admissible.]² — (W. § 1719.)

Illustration. An assertion "My back aches" is admissible only when made to a physician, by Cl. (2); but a scream, "Ouch," is admissible in any case.

Distinction. A ruling may be directed at the physician's testimony rather than the patient's statement. The physician

¹ This is the orthodox and only sound rule.

² This is the New York rule, elsewhere adopted by a few Courts.

§§ 1203-1208 HEARSAY EXCEPTIONS: MENTAL CONDITION

must be *qualified by personal observation*; hence, under Rule 86, Art. 5 (*ante*, § 405) his opinion itself may be excluded, in some Courts, because it was based in part on symptoms not observed by him but only reported to him by the patient or the attendants. — (W. § 1720.)

1203 *Par. (b).* A statement of *past pain* or other sensation is not admissible, [unless made to a physician called for treatment].¹ — (W. § 1722.)

1204 *Par. (c).* A statement of the *external condition* of the body, or of the *circumstances attending* a corporal injury, is not admissible. — (W. § 1722.)

1205 *Par. (d).* A statement made *after litigation begun*, or to a physician called for the purpose of being a witness in litigation, is not admissible, [[unless in the circumstances the trial Court deems it not untrustworthy by reason of such facts]].² — (W. § 1721.)

1207 ART. 2. *Statements of Design, Intent, Motive, Emotion, etc.* A person's statement of a present mental condition, including design, intent, motive, emotion, and the like, is admissible, where no special circumstances make it likely to have been untrustworthy.

In particular:

1208 *Par. (a).* A statement of a *design* or *plan* to do some specified act, where the existence of such a design or plan is relevant under Rule 37 (*ante*, § 177) or otherwise.³ — (W. §§ 1725, 1726.)

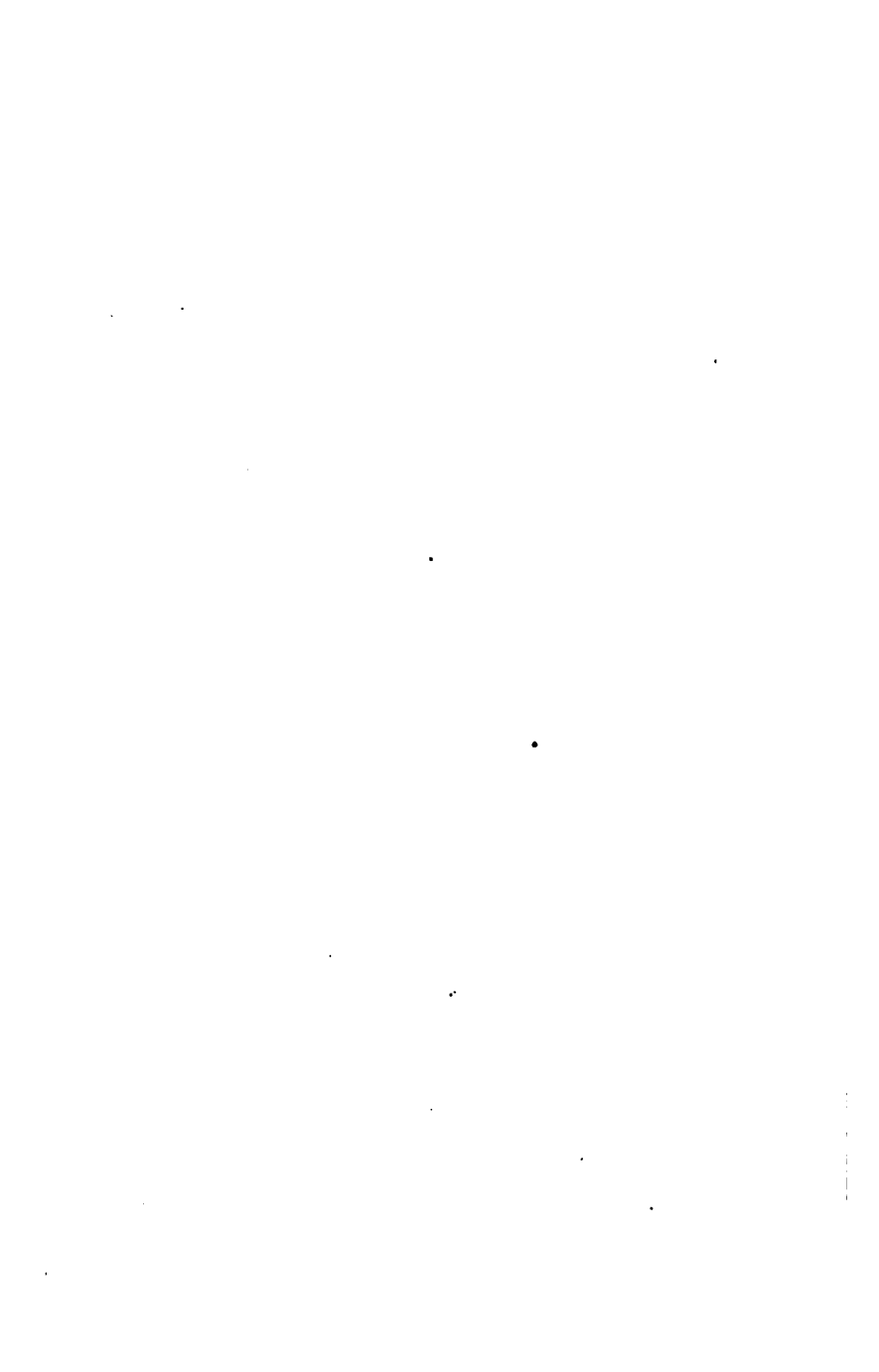
Illustrations. In an action on a disputed oral contract, a statement of intention to make it; in a prosecution for homicide at Millville, the deceased's statement of intention to go to Millville at the alleged time.

Distinctions. (1) Whether, when a *death* is explained by the defendant as suicide or the act of a third person, the statements of design by the deceased or by the third person

¹ The bracketed clause is law in Massachusetts and a few other States.

² Nowadays this principle is hard to apply. It seems better to leave its application exclusively to the trial Court.

³ A few Courts ignore this.



§§ 1209-1213 HEARSAY EXCEPTIONS: MENTAL CONDITION

are *alone* sufficient evidence to go to the jury, is a question arising under Rule 40, Art. 3 (*ante*, § 194).

(2) The verbal-act, doctrine, under Rule 155 (*post*, § 1240) has here no application, though it is sometimes invoked.

1209 *Par. (b).* A statement of a *design* to *reside* or to *remove*, when relevant on an issue of *domicil*. — (W. § 1727.)

Cross-reference. Such statements are usually receivable equally on the theory of Rule 155, Art. 2 (*post*, § 1245).

1210 *Par. (c).* A statement of a *design* to leave, stay, or return, when relevant in *bankruptcy* cases to indicate an act of bankruptcy. — (W. § 1728.)

Cross-reference. Such statements are usually receivable under Rule 155, Art. 2 (*post*, § 1245).

1211 *Par. (d).* A statement of the *motive*, *reason*, or *intent* of a specific act done. — (W. § 1729.)

Illustrations. (1) In an action for damage by a boycott, the issue being whether certain persons' custom had been withdrawn from the plaintiff because of the boycott, letters from such persons, refusing to deal with him because his name was on the defendant's blacklist, are admissible.

(2) In an action for false representations, the plaintiff's letters stating that he was acting on the faith of them are admissible, on an issue of the materiality of the representations.

Distinctions. Statements of *intent* accompanying an act are equally admissible under Rule 155, Art. 2 (*post*, § 1245); by that Rule the statement must accompany the act; by the present Rule, the statement must be of an existing mental condition; so that the result is the same.

1212 *Par. (e).* Statements of *emotion*, including bias, malice, affection, fear, disgust, and the like. — (W. § 1730.)

Illustration. In an action for alienation of a wife's affections, the wife's letters and other utterances showing the state of her affections are admissible.

1213 **ART. 3. Statements by an Accused.** The statements of an accused person are admissible under the present Rule like those of other persons; — (W. § 1732.)
in particular,

§§ 1214-1220 HEARSAY EXCEPTIONS: MENTAL CONDITION

1214 *Par. (a)* statements, made before an act, of a *design* (threat) to do or not to do an act charged;

Cross-reference. The relevancy of the design itself is determined by Rule 37 (*ante*, § 177) and Rule 59 (*ante*, § 266).

1215 *Par. (b).* Statements, made before an act, of a *feeling* of malice, [good-will,] fear, or the like, towards a particular person or class of persons.¹

Cross-reference. The relevancy of the feeling itself is determined by Rule 38 (*ante*, § 185) and Rule 67 (*ante*, § 322).

1216 *Par. (c).* Statements, made at the time of an act, of the *intent* or motive for doing it.

1217 *Par. (d).* But not statements, made *after an act*, as to a past intent or motive;
except so far as admissible

(1) under Rule 63 (*ante*, § 294) or Rule 118 (*ante*, § 665) as evidential of consciousness of innocence,

(2) or under Rule 118 (*ante*, § 641) as an admission.

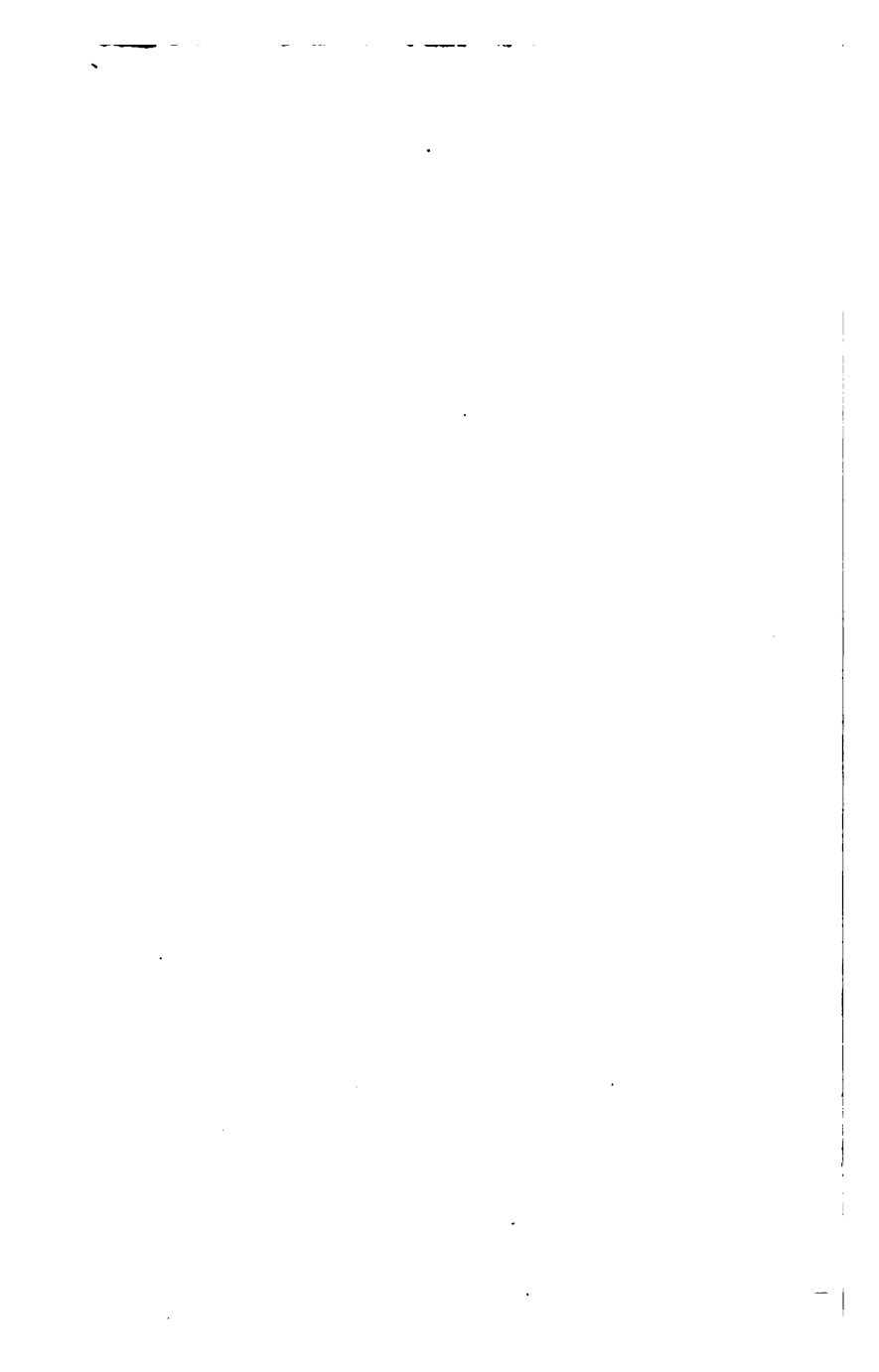
1218 ART. 4. *Statements of a Testator.* The statements of a testator, on an issue as to the validity of his will, are admissible, with the following limitations and distinctions: — (W. § 1734.)

1219 *Par. (a).* To evidence the fact that a will was *executed*,
or contained a specific provision,
or was altered before or after execution,
or was revoked,
the deceased's statement, *made before the time* of the alleged act, of a *design* to do or not to do the act, is admissible under Art. 2, *Par. (a)*, above. — (W. § 1735.)

1220 *Par. (b).* To evidence the foregoing class of facts, the deceased's statement, *made after the time* of the alleged act, [(1) is not admissible.]²

¹ Some Courts exclude utterances of good-feeling and the like.

² Many Courts take this view.



[(2) is admissible.]¹

[(3) is admissible if in the circumstances the trial Court deems it useful].² — (W. § 1736.)

1221 *Par. (c).* To evidence the fact of *revocation*, the deceased's statements *before* or *after* the time of the alleged act are governed by *Par. (a)* and *Par. (b)* above;

but his statements *at the time* of an act of destruction or the like, alleged to be an act of revocation, are admissible under Rule 155, Art. 2 (*post*, § 1245). — (W. § 1737.)

1222 *Par. (d).* To evidence the fact of *undue influence* or *fraud*, the deceased's statement is not admissible, insofar as it is offered as a *direct assertion of the fact* of influence or fraud. — (W. § 1738.)

1223 *Par. (e).* To evidence the fact of *undue influence* or *fraud*, the deceased's statement is admissible, insofar as it is offered to evidence circumstantially his *mental condition* under the principle of Rule 54 (*ante*, § 251);

in particular,

(1) to evidence his *incapacity to resist pressure* and his *susceptibility to deceit*;

(2) or, to evidence his *normal state of testamentary inclinations*, as a standard from which can be determined whether the terms of the will as made are a deviation due to the alleged coercion or fraud.³ — (W. § 1738.)

Illustrations. The testator said: "I have made my will; I could not help it, but I do not like it: I never know what I am doing when James talks to me." "I am very fond of Joseph; I wish he could have all my property." "George was here, and made me sign a will he brought." The first would perhaps be admissible under Cl. (1), the second under Cl. (2); the third would be inadmissible under *Par. (d)*.

1224 *Par. (g).* To evidence the fact of *sanity* or *insanity*, the testator's utterances are admissible, under the principle of Rule 55 (*ante*, § 252) and Rule 57 (*ante*, § 264).

¹ Some Courts take this view.

² A few Courts take this, the only practical view.

³ These distinctions are fairly well accepted, subject to local peculiarities.



RULE 154. *Spontaneous Exclamations.* A statement made
1230 by a person spontaneously in consequence of a sudden outward occurrence causing excitement or shock, is admissible; subject to the following limitations and distinctions:— (W. §§ 1747-1749.)

(Reason and Policy. The fundamental considerations (Rule 137, *ante*, § 950) underlying the hearsay exceptions are here fulfilled. There is a diminished risk of untrustworthiness, in that the stress of excitement stills the reflective faculties and makes likely a sincere utterance. There is a necessity, in the sense that on the subjects covered there is no other testimony likely to be as sincere and free from calculation.)

Illustrations. (1) The plaintiff's intestate died of an illness whose cause is in issue. The intestate, a week before, had risen from bed at midnight, gone down the back stairs, and in fifteen minutes returned, and entered his son's bedroom asking for help; his scalp was bleeding, his face cut, and his clothes torn; his statement, then made to his son, that he had slipped and fallen downstairs, or had been attacked by burglars, or had felt faint and awoke with the hurts upon him, is receivable.

(2) After a railroad collision, the engineer, upon being extricated from the overturned engine, says, "I thought that they had given me No. 10's schedule;" this is admissible.

ART. 1. *Nature of Occurrence.* The occurrence may be
1232 anything involving sudden outward physical force apt to overwhelm the attention and prevent cautious reflection as to one's utterances.¹

Illustrations. A railroad collision, an assault with a knife, a runaway horse, an explosion, a fire alarm, a shipwreck.

ART. 2. *Time of Utterance.* The utterance may be at any
1233 time during or after the occurrence, if before time enough has elapsed to devise anything for his own interest.²— (W. §§ 1750, 1756.)

Illustration. (1) After a collision between a ship and a steamer, the steamer is backing off, and as it tries to turn, some five minutes after the actual collision, the pilot finds that the helm will not obey, and stamps his feet, exclaiming, "The rudder-chain is broken;" this may be admissible.

¹ There are few precedents defining this part of the rule.

² This is Lord Holt's time-honoured phrase, when he invented the exception, and cannot be improved upon.

1112

1113

1114

1115

1116

1117

1118

1119

1120

1121

1122

1123

1124

1125

1126

1127

(2) The body of man is found, wounded and senseless by the railroad track; he is carried to a hospital, and after an hour he regains his senses, and asks where he is; they tell him; and show him the cuts on his hands; he says, "The horse must have run away when I stopped to mend the brake," or "I thought that I could cross the track before the train came;" this may be admissible.

1234 [Par. (a). The time depends solely on the circumstances of each case.]¹

ART. 3. *Subject of Utterance.* The utterance must relate
1235 to the circumstances of the occurrence that gave rise to it.² —
(W. § 1750.)

Illustration. After a street-car has run over a child, and is stopped, and while the body is being extricated, the motorman says: "I saw the boy and rang the bell, and thought he could cross over, but he fell. The boys have often done this kind of thing before, in a dare, and to worry me." The first sentence is admissible, but not the second.

ART. 4. *Personal Knowledge; Bystander.* On the prin-
1236 ciple of Rule 86, Art. 5 (*ante*, § 405), the person must have had personal observation of the matter spoken of, and under the present Rule, Art. 1, he must have been subjected to the influence of the outward occurrence.

Therefore, he may be

Par. (a). An actor or participant in the occurrence.

Illustrations. In a street car collision, the motorman or the conductor of the street car colliding, or a passenger therein; in an affray, the injured or the injuring party; in a runaway, a passenger or the driver; etc.

1237 [Par. (b) or, a bystander.]³ — (W. § 1755.)

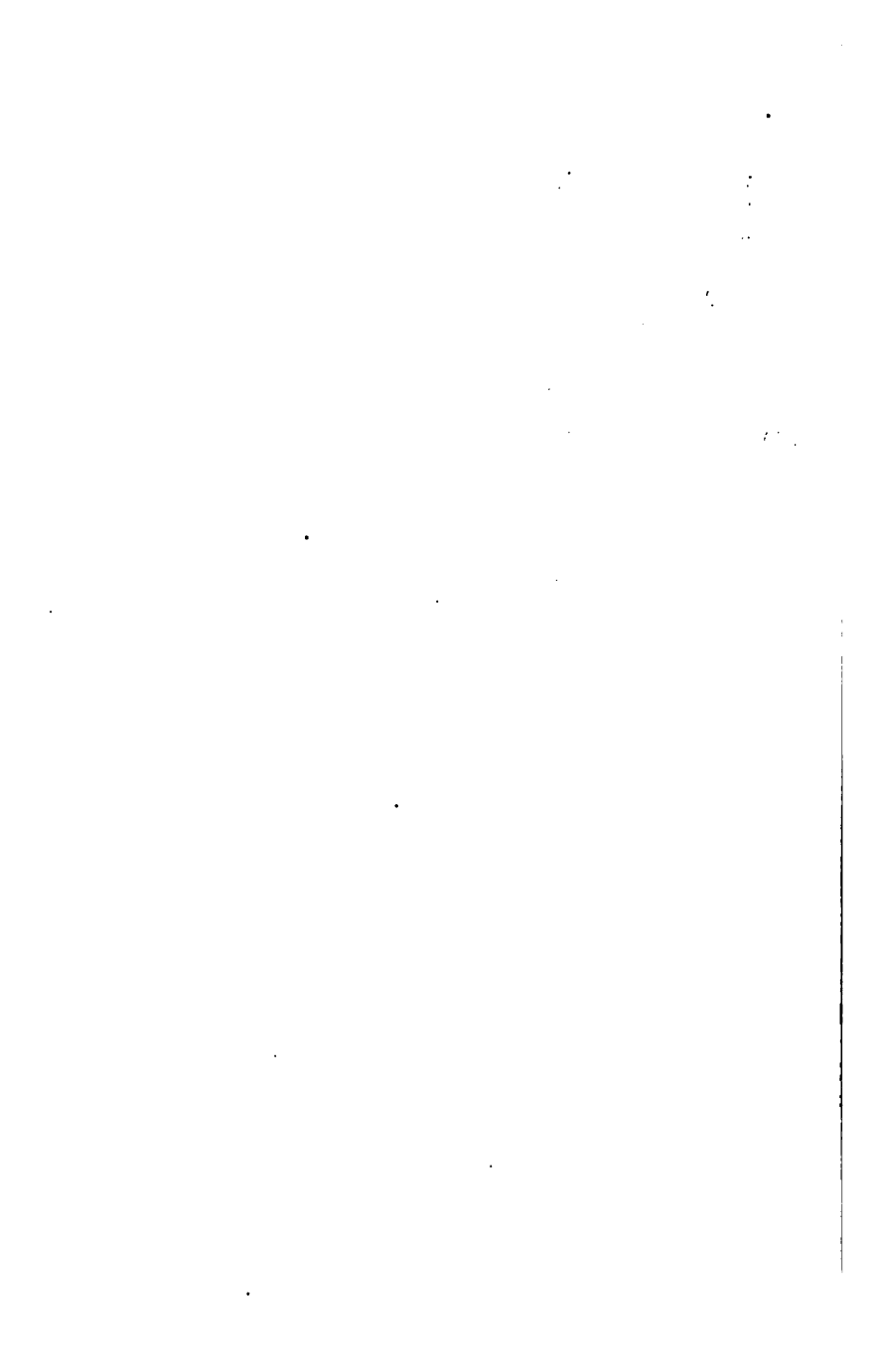
Illustration. A bystander cries out to M that B is drawing to shoot M, and B shoots M; this is admissible.

[ART. 5. *Complaint of Rape or Robbery.* A complaint of a
1238 crime of violence, stating the details thereof, is admissible

¹ This puts the ruling entirely in the trial Court's determination under Rule 18 (*ante*, § 49). A few Supreme Courts observe this; but most of them misguidedly revise such rulings and try to make precedents.

² Courts have seldom defined this part of the rule.

³ Many Courts deny this, but not soundly.



when made freshly after the time of the act, within Art. 2 above, "provided there is other evidence of violent assault," in the following cases:]

[*Par. (a). Rape or attempted rape.*]¹ — (W. §§ 1760, 1761.)

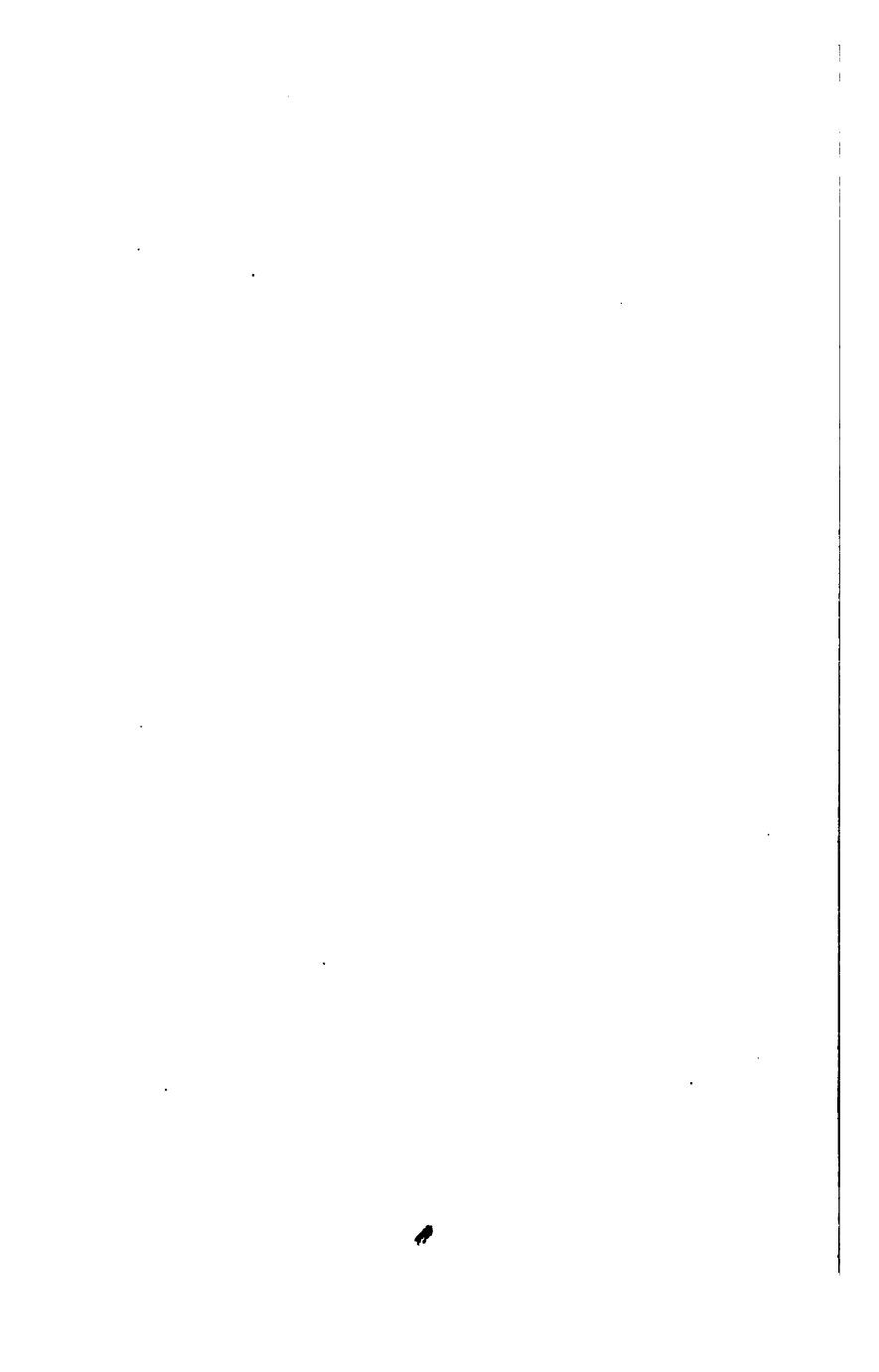
Cross-reference. For another rule applicable to such utterances, in corroboration of the complainant as a witness, see Rule 114, Art. 1 (*ante*, § 622).

1239 [*Par. (b). Robbery, larceny, or burglary.*]² — (W. § 1762.)

Cross-reference. For another rule applicable to such utterances, see Rule 114, Art. 3, (*ante*, § 627).

¹ A few Courts recognize the above rule. The majority govern such evidence by the other rule referred to. — The proviso is necessary, under the present rule.

² A few Courts recognize this.



SUB-TITLE III: HEARSAY RULE NOT APPLICABLE

1240 RULE 155. *General Principle.* The hearsay rule, being designed to test the trustworthiness of testimonial assertions offered to evidence the matters asserted (Rule 134, *ante*, § 910), does not apply to utterances not so offered; these are therefore admissible (if otherwise relevant and admissible), without being required to satisfy the conditions of the foregoing exceptions.

Such utterances are of four sorts:

- (1) Utterances forming a *part of the issue*;
- (2) Utterances forming a *verbal part of an act* which is in itself otherwise material;
- (3) Utterances *relevant circumstantially*, not *testimonially*.
- (4) Utterances admissible to *explain* and *complete* another utterance. — (W. § 1768.)

1241 *Par. (a).* The *jury may be instructed* that an utterance admitted under the present rule is not to be given any testimonial credit as an assertion of fact.¹

1242 ART. 1. *Utterances forming a Part of the Issue.* Where the utterance of specific words is itself a part of the details of the issue, under the substantive law and the pleadings, the utterance may be introduced for that purpose. — (W. § 1770.)

In particular:

1243 *Par. (a).* Utterances material in the *formation* or the *performance* of a contract;

Illustrations. (1) In an action for goods sold, the defendant alleged that they were sold to M, and that the defendant was merely agent for M. The defendant had applied as a purchaser, and had referred the plaintiff to M for information as to credit; the plaintiff's letter to M, inquiring as to the defendant's credit, and stating that the plaintiff was selling

¹ This follows from Rule 15 (*ante*, § 42) and Rule 5, Art. 4 (*ante*, § 15).

§§ 1244-1245 HEARSAY RULE NOT APPLICABLE

to the defendant on condition of his credit being satisfactory, is admissible as part of the negotiations of contract.

(2) In a life-insurance policy, it is provided that before the insurer becomes liable the insured's representative shall furnish a physician's certificate of the cause of death; this certificate is admissible as a part of the performance of the condition precedent in the contract.

1244 *Par. (b). Utterances forming or excusing a tort.*

Illustrations. The utterance sued upon in libel; the threats of assault justifying self-defence.

1245 *ART. 2. Utterances forming a Verbal Part of an Act.* Where an utterance forms a verbal part of a person's act or conduct to which some legal effect is attached, it is admissible, provided

(1) the act or conduct must be *independently material* in the case;

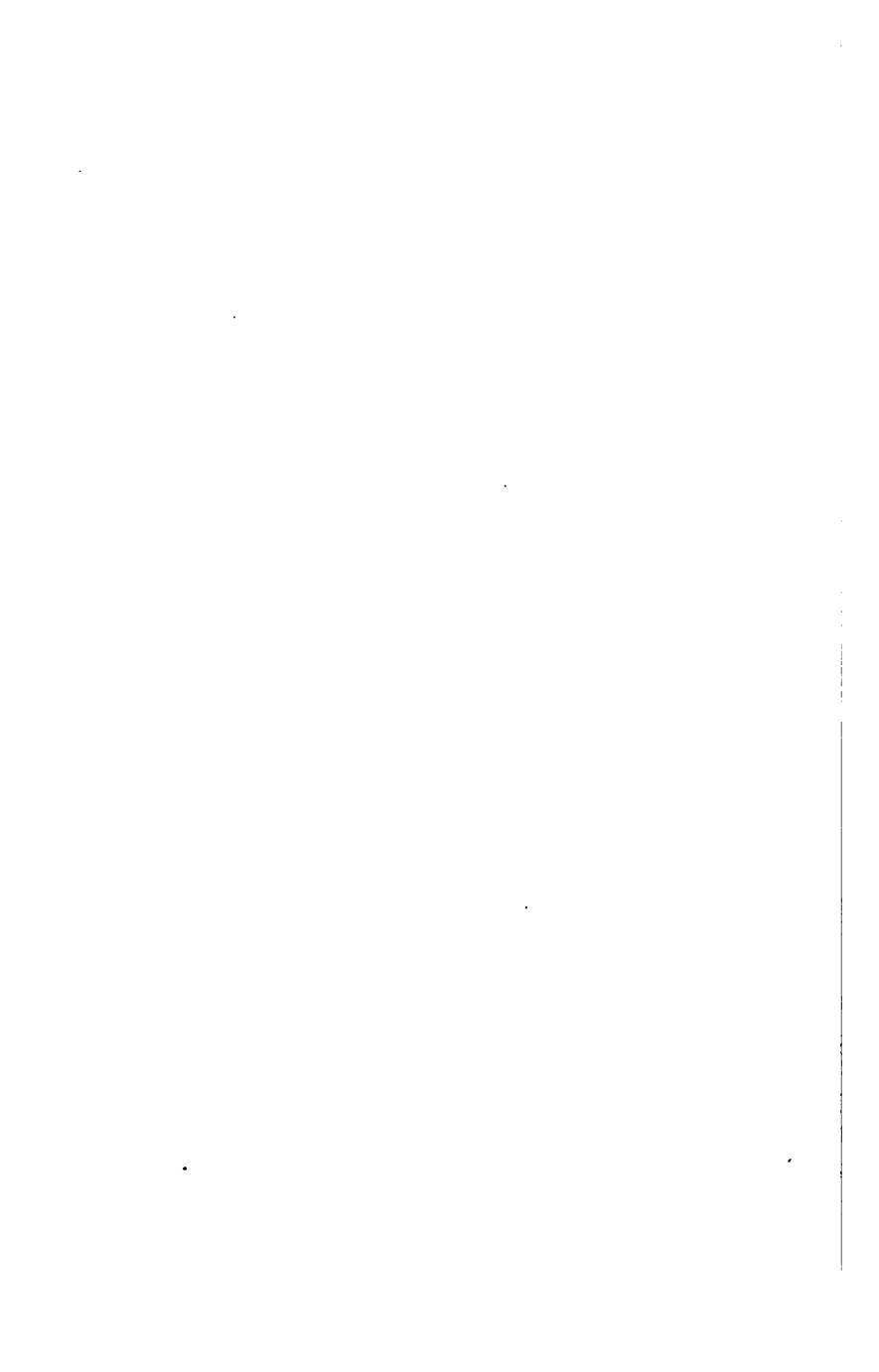
(2) the act or conduct must be *equivocal* or *ambiguous* in tenor, i. e. is not of itself complete in legal significance;

(3) the utterance must *aid in giving this legal significance*; and

(4) the utterance must *accompany in time* the act or conduct. — (W. §§ 1772-1776.)

Illustrations. (1) Issue of payment by P to J; P had handed money to J; P's words at the time of handing the money, "This is the money I borrowed," are admissible, as indicating whether it is a loan or a payment or a deposit, because the act of handing the money is independently material in the case. But if P takes M down in his cellar, and shows some money concealed, his words "This is the money I am collecting to pay back to J" are not admissible, because the act of concealing, keeping, or showing the money to M is not otherwise material.

(2) In an action for suing out an attachment without probable cause, the defendant's probable cause is alleged to be that the plaintiff had given a chattel mortgage to another person while insolvent. The defendant's statement at the time of applying for the attachment-writ is not admissible, because the act of so applying is not equivocal. But if the defence is that the defendant did not actually serve the writ, but merely went to the plaintiff's house to demand payment and to threaten suit, then the utterance of the defendant while on the plaintiff's premises with the writ in his possession is admissible, because his presence is an equivocal act needing the words to complete its tenor.



(3) In a land action based on prescriptive title, the plaintiff's acts of occupation being material, his statement, when building a fence, that the fence would keep his land from being intruded on, is admissible, because the words serve to give to the equivocal act of building a fence (which might be that of a carpenter or a tenant or a claimant in fee) its full tenor as an act of claim of title. But the plaintiff's statement, while building the fence, that the defendant's father had once been driven out of town for horse-stealing, or that the defendant himself had got his land by fraudulent entry at the land-office, does not aid in giving significance to the plaintiff's own act, and is not admissible.

(4) In an action to set aside a conveyance by a bankrupt, the time of the act of bankruptcy is material. The debtor having left the town on Jan. 1, and returned on Feb. 1, and the departure being alleged as an act of evasion, a letter from him on Jan. 15, stating that he was called away by his mother's illness, or that he was not coming back unless his creditors agreed to release him, may be admissible; because the act of evasion of creditors is a continuous one, and any utterances made during that absence may be admissible, though not those made after his return.

In particular, the significance of the following classes of acts may be thus aided by considering the accompanying utterances:

1246 *Par. (a).* An act of *handing* or of *taking* money, document, or other *chattel*; to ascertain whether it is a payment, loan, sale, gift, advancement, consideration, conversion, etc. — (W. § 1777.)

1247 *Par. (b).* An act of *entry on land*; to ascertain whether it is a lease, grant, acceptance, disseisin, etc. — (W. § 1778.)

1248 *Par. (c).* An act of *occupation of land*; to ascertain whether the occupation is adverse, on an issue of *title by prescription*.¹ — (W. § 1778.)

And such accompanying utterances

(1) may be those of a *tenant* occupying under a claimant to title;

(2) may consist in *deeds* or other documents indicating the area claimed;

¹ There are here rulings apparently contrary; these are due to the other rules sometimes invoked.

1249

[*Par. (d).* An act of *occupation or custody of land or chattels*; to ascertain whether the declarant has possession under claim of title, and thus to enable the *presumption of title from possession* (Rule 228, Art. 16, *post*, § 2067) to operate.]¹ — (W. § 1779.)

[And in particular,

(1) on an issue whether a *chattel attached by a creditor* is the property of the debtor or of a third person claimant; the declarations of claim or disclaim, by the person in possession, whether debtor or third person claimant, being admissible either for the creditor or for the claimant.]²

Distinctions. (1) Statements of *facts against proprietary interest* may be admissible as an exception to the hearsay rule, under Rule 139, Art. 2 (*ante*, § 968).

(2) Statements concerning *boundaries* may be admissible as an exception to the hearsay rule, under Rule 144 (*ante*, § 1035).

(3) Statements by a party or privy, as to his title-defects, may be receivable *against him as admissions*, under Rule 121, Arts. 4, 5 (*ante*, §§ 691, 692). But admissions of the *contents of a deed* are subject to Rule 127, Art. 2 (*ante*, § 807).

Illustrations. (1) In an action between Jones and Smith for title to land, Jones claims by inheritance from his uncle who had a deed from M, and Smith claims by prescription under N. Smith may introduce his own statements claiming title when he was in occupation, under Rule 155, Art. 2, *Par. (c)*, but not otherwise; he may also introduce the statements of M, and here would be admissible under Rule 121, Art. 4, without showing M to be deceased, etc., but under Rule 139, Art. 2, M must be shown deceased, etc. Jones may introduce his uncle's statements of claim while in possession, under Rule 155, Art. 2, *par. (d)*. Jones may introduce the admissions of N that he had no deed, under Rule 121, Art. 5, provided they were made before N gave up possession to Smith. Jones may also introduce N's admissions that Jones' uncle had a deed from M, unless by Rule 127, Art. 2, he is first required to evidence the existence and loss of such a deed.

(2) In an action of trover by Perkins against creditors attaching a wagon as the property of their debtor Williams,

¹ Courts are here divided.

² This clause ignores some of the subtle distinctions that could be made; but they are for practical purposes mere quibbles, and should not be perpetuated.

in whose possession it is, the declarations of claim by Williams could be used by the creditors under Rule 155, Art. 2, par. (d) ; and his declarations of disclaim could be used by Perkins under Rule 121, Art. 5; furthermore, if Perkins derives title by purchase from Williams, the latter's declarations of claim could also be used by the creditors under Rule 121, Art. 5, which however has peculiar limitations.

1250 [Par. (e). An act of *taking* or *possessing* a chattel; to determine whether the taking was done with criminal intent, on a charge of *larceny* or the like.]¹ — (W. § 1781.)

Cross-reference. (1) For the use of such statements to corroborate the accused's testimony, see Rule 114, Art. 4 (*ante*, § 628).

(2) For the *presumption* from *unexplained possession* of recently stolen goods, see Rule 228, Art. 15 (*post*, § 2066).

1251 Par. (f). An act of *tearing*, *burning*, or *cancelling* a *will*; to determine whether it was a *revocation*. — (W. § 1782.)

Cross-reference. For statements *before* or *after* the act, see Rule 153, Art. 4 (*ante*, § 1221).

1252 Par. (g). An act of *refusal to pay*, departure from domicile, or other act in obstruction or evasion of a creditor's claim; to determine whether it was an *act of bankruptcy*. — (W. § 1783.)

Cross-reference. For the use of such statements under the exception for statements of *intent*, see Rule 153, Art. 2 (*ante*, § 1207).

1253 Par. (h). An act of *staying* in or *removing* from a place; to determine whether there was a *domicil* at that place or elsewhere. — (W. § 1784.)

Cross-reference. For the use of such statements under the exception for statements of *intent*, see Rule 153, Art. 2 (*ante*, 1207).

1255 ART. 3. *Utterances used as Circumstantial Evidence.* Where an utterance is relevant and admissible as circumstantial evidence for some purpose, it may be received for that purpose, subject to an instruction under this Rule, par. (a)

¹ There is room here (as in the rulings) for sundry subtle distinctions; but no harm is done practically by ignoring them.



§§ 1256-1260 HEARSAY RULE NOT APPLICABLE

(*ante*, § 1241), not to give to it any testimonial credit. — (W. § 1788.)

In particular, such utterances may be of the following sorts introduced for the following purposes:

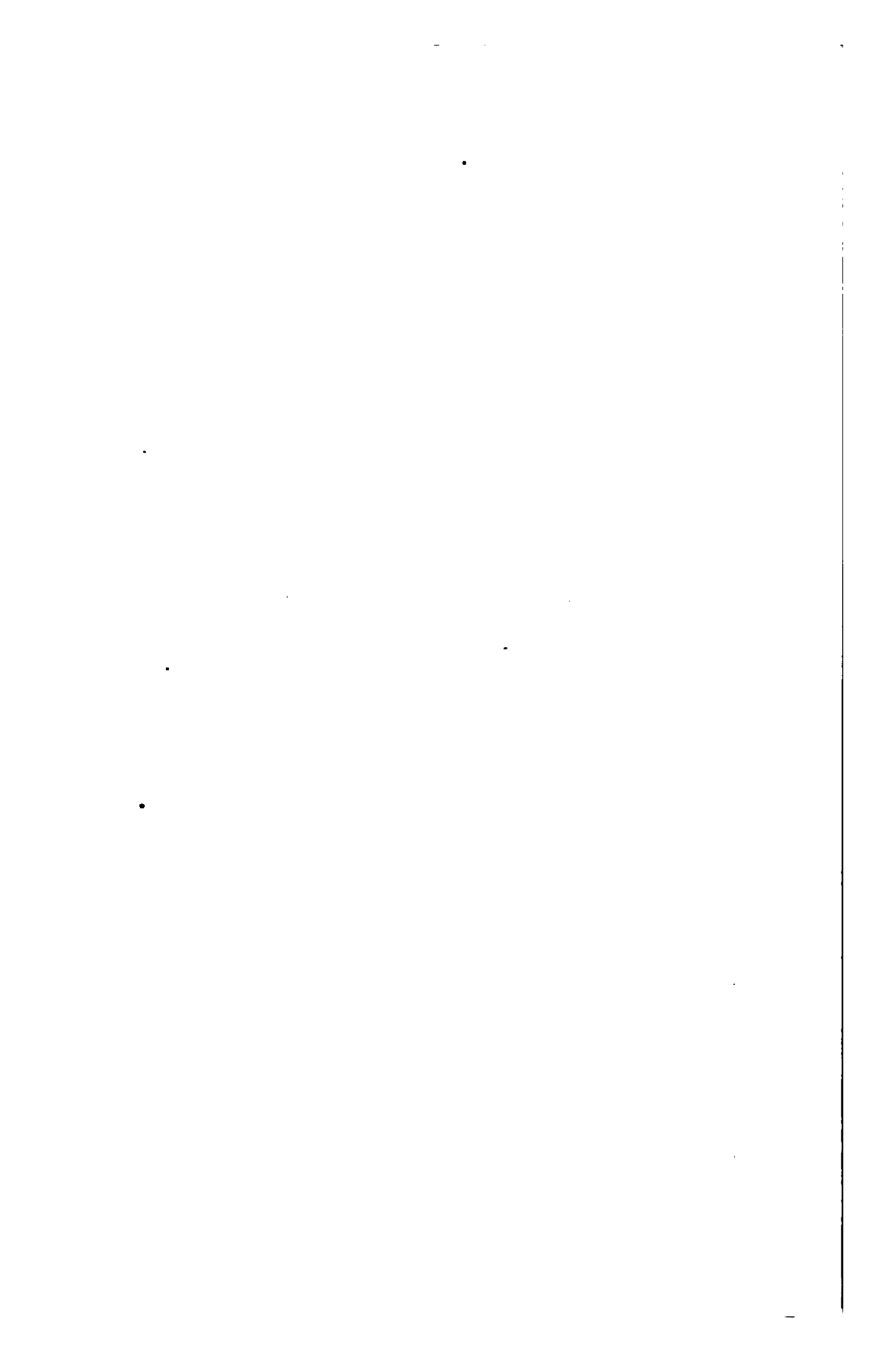
1256 *Par. (a).* A statement made by one person and brought to the notice of another person, or a repute in the community, to evidence the *other person's mental condition* as to *knowledge, belief, good faith, reasonableness, motive, sanity*, or the like, under Rule 55, Art. 5 (*ante*, § 257), Rule 62, Arts. 1-11 (*ante*, §§ 277-288), Rule 67, Art. 1 (*ante*, § 324), *ib.* Art. 6 (*ante*, § 329), Rule 126, Art. 4 (*ante*, § 759), and elsewhere. — (W. § 1789.)

1257 *Par. (b).* A statement made by a person, to evidence circumstantially his *own state of mind*, under Rule 55, (*ante*, § 252), Rule 59 (*ante*, § 266), Rule 60 (*ante*, § 270), Rule 63 (*ante*, § 290), Rule 67, Art. 4 (*ante*, § 327), and elsewhere. — (W. § 1790.)

1258 *Par. (c).* A statement used to *identify* a time, place, or person, under Rule 68, Art. 3 (*ante*, § 336). — (W. § 1791.)

1259 *Par. (d).* A statement used to *impeach* a witness by way of *self-contradiction*, under Rule 108 (*ante*, § 574) or of *bias*, under Rule 102, Art. 2 (*ante*, § 537), or of *corruption*, under Rule 103 (*ante*, § 540), or to *corroborate* a witness by way of *consistency*, under Rules 113 and 114 (*ante*, §§ 612, 621), or to impeach a *party* by way of *admissions* or *confessions* under Rules 115-122 (*ante*, §§ 630-724). — (W. § 1792.)

1260 ART. 4. *Utterances used by way of Completeness.* When for the purpose of explaining and completing the correct significance of an utterance already in the case, the *remainder of a document, conversation*, or other utterance, is receivable as a complement thereof, under Rule 185 (*post*, § 1575), it is not excluded by the hearsay rule; but is subject to an instruction, under this Rule, *par. (a)* (*ante*, § 1241), as to testimonial credit. — (W. § 1786.)



SUB-TITLE IV: HEARSAY RULE AS APPLICABLE TO COURT OFFICERS

RULE 156. *General Principle.* The respective officers in a
1265 court are subject, like other persons, to the hearsay rule, *i. e.*
in that every testimonial statement desired to be used in
persuading the tribunal as to facts in issue must be presented
subject to the test of cross-examination.

ART. 1. *Juror.* A juror is not to use as evidence any
1266 testimonial statement not duly presented in court under
the test of cross-examination;
subject to the following distinctions and qualifications:

Par. (a). A juror having *personal observation* of any
1267 relevant fact must testify to it like any other witness. —
(W. §§ 1800, 1801.)

Distinctions. (1) When a matter is *notorious* so as to be
available for *judicial notice*, the juror may use it without
testifying, under Rule 230 (*post*, § 2120).

(2) A policy prohibiting a juror from testifying, or *dis-*
qualifying him as a juror because he may be a witness, in-
volves Rule 167, Art. 3 (*post*, § 1405).

Illustration. In a personal injury case, one of the jurors
lived near the place of the injury and knew of the track-gate
being out of order. This he should testify to, like any witness.
But the fact that at five o'clock in midwinter it was dark at
the track-crossing might be judicially noticed by him, on
motion made. Whether he would be disqualified as juror by
reason of his personal knowledge would be a different question.

Par. (b). A juror is not to listen to any testimonial
1268 statements, relative to the cause, made *out of court*, in
particular, at a *view*;

except the statements made by the *showers*, judicially
appointed to point out the place or thing to which the
testimony relates. — (W. § 1802.)



Distinctions. (1) Whether a juror's improper conduct in so listening is *ground for setting aside the verdict* is a further question, belonging to the law of procedure.

(2) Whether the jurors may take with them, on retiring, *documents duly in evidence*, is a question of the law of procedure.

(3) Whether the jurors may consider as *evidence* the matters personally observed at a *view*, is a question of the theory of a view, under Rule 123, Art. 3 (*ante*, § 734).

1269 *Par. (c).* The principle of Confrontation, as provided in Rule 136 (*ante*, § 928), does not require that the *party to the case* should be *present*, or have an opportunity to be present, at a view;

[nor, in particular, the *accused* in a criminal case].¹ — (W. § 1803.)

1270 ART. 2. *Judge.* A judge having personal observation of any relevant fact must testify to it like any other witness. — (W. § 1805.)

Distinctions. (1) Where a matter is so *notorious* as to be available for *judicial notice*, the judge may use it without testifying, under Rule 230 (*post*, § 2120);

(2) whether policy prohibits the judge from *resuming the bench* after testifying involves Rule 167, Art. 2 (*post*, § 1404).

1271 ART. 3. *Counsel.* A counsel is not to make or use any *testimonial statement*, directly or indirectly, for persuading the tribunal, without presenting it in the usual manner under the test of cross-examination;

subject to the following distinctions and qualifications:

1272 *Par. (a).* He is not to assert in argument or other speech any matter of fact upon which evidence has not *already* been *introduced*, or is not *bona fide* intended to be introduced, by testimony formally given by himself or by others. — (W. § 1806.)

Cross-reference. For the rule as to *conditional admissibility*, see Rule 16 (*ante*, § 45), and Rule 163, Art. 2 (*post*, § 1360).

1273 *Par. (b).* He may assert any matter so *notorious* as to be capable of *judicial notice* under Rule 230 (*post*, § 2120). — (W. § 1807.)

¹ Some Courts here hold the contrary.

1274 *Par. (c).* He may assert in argument any matter which serves as an *illustration, symbol, or analogy*; a test is whether the correctness of the specific fact asserted would be immaterial to the case in hand.¹ — (W. § 1807.)

1275 *Par. (d).* He may assert in argument any matter said to be *logically inferrible* from some fact in evidence. — (W. § 1807.)

Illustrations. To illustrate the anomalous shrewdness of insanity or vagaries of sanity, he may cite alleged instances of other persons' conduct, under *Par. c*; but under *Par. a* he must not attribute such to the party without evidence. To illustrate the evils of bribery, he may quote a description of the upas tree, under *Par. c*; but under *Par. a* he must not assert that the National Political Committee's complicity is a sinister influence to be repudiated by the verdict, unless under *Par. d* he offers this as an inference from some evidence in the case. He may refer under *Par. b* to the notoriety of lynchings, but he must not state that this defendant was almost lynched before the trial.

1277 *Par. (e).* In stating an *offer of evidence*, he must present it either in *writing*, or in the *absence of the jury*, wherever the mere offer is likely to make an undue impression upon the jurors of the truth of the supposed fact. — (W. § 1808.)

1278 *Par. (f).* In seeking answers from a witness, he must not *ask a question*

(1) when his sole purpose is to *insinuate to the jury a fact* [which he does not expect to be able to evidence]² [which he does not believe to be probable];³

in particular, a fact discrediting moral character under Rule 105, Art. 2 (*ante*, § 552),

(2) or, when substantially the same matter has been *already objected to and ruled inadmissible*; subject to the right to renew an offer under Rule 19, Art. 2 (*ante*, § 61). — (W. § 1809.)

1280 ART. 4. *Interpreter.* An interpreter's or translator's report of another person's statement is itself testimony. Hence

¹ This class is difficult to define.

² The first and stricter of these clauses may not be law; and the phrasing of the second clause is difficult.

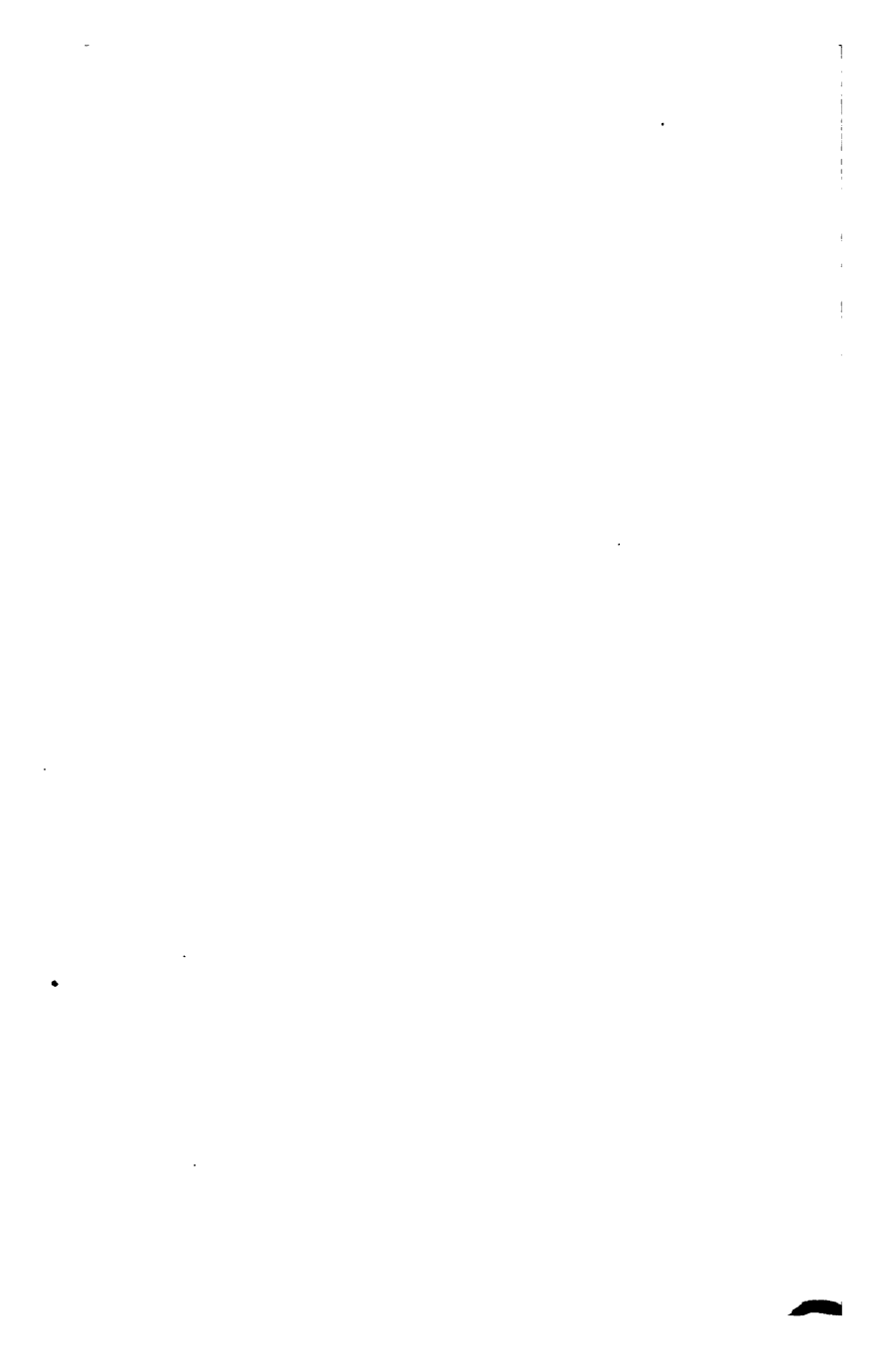
§§ 1281-1282 HEARSAY RULE: INTERPRETER

1281 *Par. (a).* When the testimony of a witness given at a *former trial* or by *deposition* through an interpreter or translator is to be introduced, the interpreter or translator must be called to testify or must be accounted for as unavailable under Rule 136, Arts. 1 and 2 (*ante*, §§ 929, 930);

(1) *except* when the interpreter or translator was appointed by judicial order or was otherwise officially authorized under Rule 148, Art. 2 (*ante*, § 1092), Art. 3 (*ante*, § 1134). — (W. § 1810.)

1282 *Par. (b).* When a statement made by a person *out of court*, speaking through an interpreter, is to be introduced, the interpreter must be called as the witness to the statement;

(1) *except* where under the circumstances the person speaking was a party who made the interpreter his agent to speak for him. — (W. § 1810.)



TITLE II: PROPHYLACTIC (OR, PRECAUTIONARY) RULES

SUB-TITLE I: OATH AND AFFIRMATION

1285 **RULE 157. *General Principle.*** Every person giving testimony in court or by deposition must publicly make oath or affirmation that he will in that testimony speak truth. — (W. § 1824.)

(*Reason and Policy.* The object of both oath and affirmation is to remind the witness of his solemn moral obligation, specially incumbent in a court of justice, to speak the truth as he knows it. The oath exceeds the affirmation in that it reminds him of his theological belief as to future divine punishment for lying. Where such belief is lacking, the peculiar feature of an oath is ineffective; the witness should, however, not be excluded on that account, but merely caused to affirm. The inefficiency of the oath to cause some people to speak truth is no reason for abolishing it, if there are others whom it does impress.)

1286 **ART. 1. *Nature of the Oath.*** The oath is a promise to speak truth, made under a sense of the divine punishment for speaking falsely.¹ — (W. §§ 1816, 1817.)

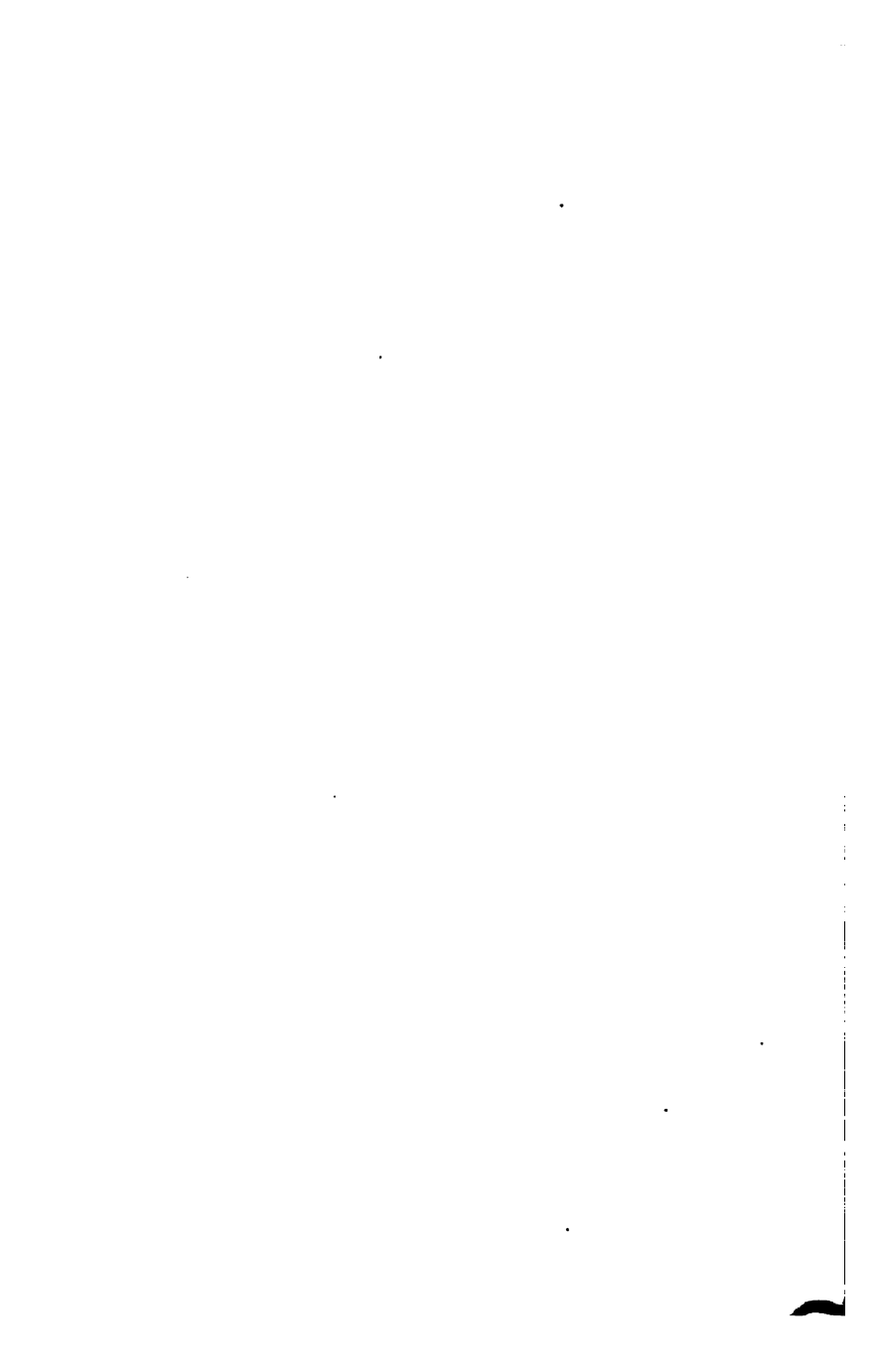
1287 **ART. 2. *Capacity to take Oath.*** A witness is capable to take oath whose creed or theological belief makes him capable of being impressed by the fear of divine punishment. — (W. § 1817.)

1288 ***Par. (a).*** No particular tenet, sect or creed of religion or theology is requisite, otherwise than as above. — (W. § 1817.)

1289 ***Par. (b).*** No particular age, and no formal theological learning, is required for a *child*. — (W. § 1821.)

Cross-reference. For the rule as to *age*, apart from the oath, see Art. 7 (*post*, § 1305; affirmations) and Rule 81 (*ante*, § 370; testimonial capacity in general).

¹ A few Courts formerly held that the punishment must be in a future life.



1290 *Par. (c).* No particular degree of mental intelligence is required for a person of *weak* or *unsound mind*. — (W. § 1822.)

Cross-reference. For the rule as to *testimonial capacity* for such persons, see Rule 80 (*ante*, § 367).

1291 *Par. (d).* A person offered as a witness is *presumed* capable to take oath; but his appearance as a child or otherwise may remove the presumption. — (W. § 1820, n. 1.)

1292 ART. 3. *Mode of ascertaining Capacity.* In ascertaining capacity, testimony may be taken

[(1) from the proposed witness himself;¹ subject to his privilege under Rule 201, Art. 5, *post*, § 1699;]

(2) and also, from other witnesses. — (W. § 1820.)

1293 *Par. (a).* A *child* may be examined, in public, or in private in the counsels' presence, by the *judge*. — (W. § 1820, n. 2.)

1294 *Par. (b).* A child, deficient when examined, may be *instructed* so as to become capable.² — (W. § 1821, n. 9.)

1295 ART. 4. *Form of taking Oath.* No particular form of procedure is requisite in taking oath;

subject to the following exceptions and distinctions:—
(W. § 1818.)

1296 *Par. (a).* The form must be one which the *particular witness regards* as subjecting him to the divine punishment for false speaking.

1297 *Par. (b).* Except where otherwise ordered by the judge,³ or where needed for a particular witness, the form shall

¹ Some Courts, mainly in early decisions, deny this; but it is the sound rule; the witness is sufficiently protected by his privilege.

² This is law; but it is futile, and would be useless under Art. 8, *post*, § 1307.

³ This provides for variations of local custom.



consist in *raising the right hand* and [saying, I do, to] ¹ [[repeating aloud]] the following words of oath as first pronounced by the clerk:

“ I solemnly swear to tell the truth, the whole truth, and nothing but the truth, So help me God.”

1298 [[*Par. (c).* The oath shall in no case be administered to *more than one person* at one time, nor before the witness enters the witness-stand]].² — (W. § 1819, n. 1.)

1299 *Par. (d).* The oath need not be administered *more than once* [[on the same day]] [in the same trial] ³ to the same witness.

1300 ART. 5. *Opponent's Waiver of the Oath.* Where a witness has testified without taking oath, and the opponent has failed to object before testimony begun, the lack of the oath cannot later be excepted to, on the principle of Rule 20, Art. 1 (*ante*, § 72);

[unless the opponent without fault believed at the time of testimony begun that the oath had been taken].⁴ — (W. § 1819.)

1301 *Par. (a).* On objection made after testimony begun and before close of the trial, the oath may be taken and the witness may re-testify, and the testimony thus given is not open to exception.

1302 ART. 6. *Witness' Exemption from Oath.* The taking of the oath is dispensable; subject to the following distinctions: — (W. § 1828.)

¹ The single-bracket clause represents the practice; but the other would be a decided improvement.

² This is probably not law anywhere; but the deplorable practice in most Courts of swearing all the witnesses at once at the opening of the case is responsible largely for the ineffectiveness of the oath.

³ The latter of these clauses is the practice; but the former would conduce to truth by renewing the reminder when needed.

⁴ Some Courts seem to countenance this proviso, but it is unsound.

1303 *Par. (a).* A person *having the capacity* defined in Art. 2 is required to take oath; except that he has the *option to decline*

(1) when by his creed he has conscientious scruples against taking oaths in general;

[(2) or, when he prefers for any other reason not to take oath but to make affirmation].¹

1304 *Par. (b).* A person *not having the capacity* defined in Art. 2 is not required [nor allowed]² to take oath.

1305 ART. 7. *Affirmation as a Requirement.* A person who pursuant to Art. 6 does not take oath must make affirmation. — (W. § 1828.)

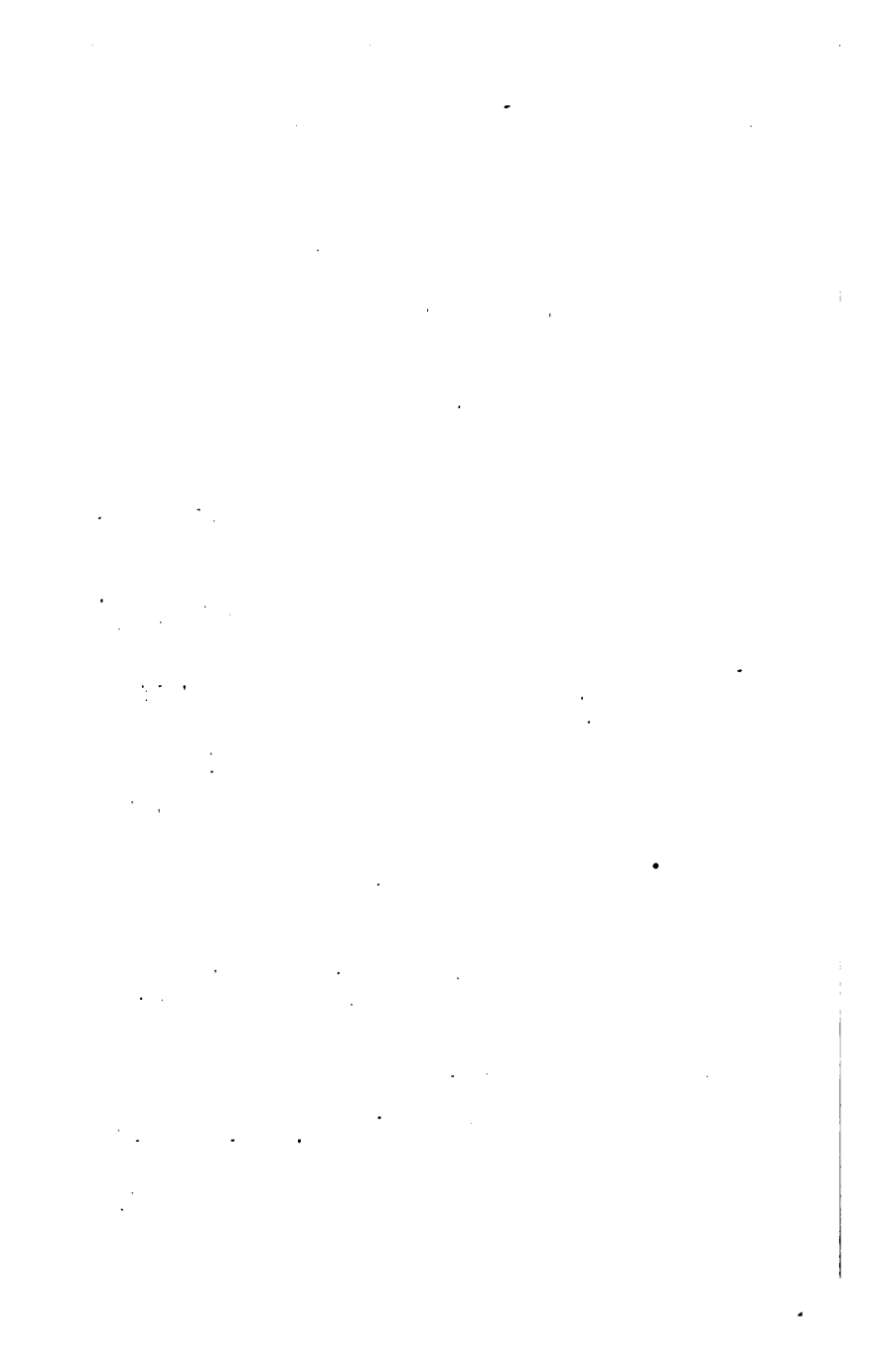
1306 ART. 8. *Form of Affirmation.* The form of affirmation shall be to repeat the words "I do solemnly affirm that I will tell the truth, the whole truth, and nothing but the truth," and in all other respects the rules of Art. 4 shall apply.

1307 [*Par. (a).* For a *child*, the judge may allow the use of such form of words as seems suitable in the circumstances.]³

¹ A few statutes make this enlargement; but it is poor policy.

² This is not the law in those States where the constitutional provision is construed to allow *e. g.* an atheist to take oath.

³ Some such flexibility is desirable, and corresponds to practice.



SUB-TITLE II:

PERJURY - PENALTY

RULE 158. *General Principle.* Every person who gives
1310 testimony in court or by deposition is liable to legal punishment, as defined in the Penal Code, for a knowingly false statement. — (W. § 1831.)

(Reason and Policy. A main object in this penalty is to make the witness more inclined to refrain from knowing falsities. The fear of temporal punishment, thus created, complements the fear of divine punishment involved in the oath. Nevertheless, as the object is merely to provide an additional safeguard when available, there is no reason to exclude those who are not effectively reached by it.)

ART. 1. *No Rule of Exclusion.* No person is excluded from
1311 testifying because under the circumstances he is legally or practically not amenable to the penalty for perjury. — (W. § 1832.)

Illustrations. A child; a person deposing in a foreign country; a person deposing in *perpetuam memoriam*; etc.

SUB-TITLE III:

PUBLICITY

RULE 159. *General Principle.* All testimony given before
1312 a judge or by deposition shall be given publicly, that is to say, it shall be delivered in the hearing of such persons at large as may be admitted to the place under general rules of court, and may be printed in the same manner as other parts of the judicial proceedings. — (W. §§ 1834-1836.)

(Reason and Policy. The publicity of judicial proceedings, while having larger reasons, is important also in its effect on testimony. Subjectively it tends to stimulate the witness' social responsibility to tell the truth, and also to fear the exposure of falsities by those who hear or read it. Objectively, it makes possible such exposure from those who hear or read.)



SUB-TITLE IV:

SEQUESTRATION OF WITNESSES

RULE 160. *General Principle.* Persons about to be witnesses, in court or by deposition, may by order of the judge or officer be so separated from each other as not to be able to communicate, while waiting, on the subject of the testimony; and may be forbidden to communicate, with or without such separation. — (W. §§ 1837, 1838.)

(*Reason and Policy.* The separation of opposing witnesses prevents them from obtaining suggestions enabling them to shape their testimony falsely. The separation of witnesses on the same side, besides tending to the same end, also tends to detect falsities concocted by connivance before coming to court, *i. e.* the inconsistent details of two witnesses whose testimony, harmonious in other respects, ought to have been harmonious also in those details, tend to show that the harmony, as far as it went, was artificial.)

ART. 1. [*Not*] *Demandable as of Right.* Separation is ordered by the trial judge of his own motion or on motion by either party [whenever in the opinion of the judge the request is reasonable].¹ — (W. § 1839.)

ART. 2. *Procedure.* The order of sequestration may be carried out as follows: — (W. § 1840.)

Par. (a). A written list specifying the witnesses may be furnished to the proper court-officer; or a general oral notice to all prospective witnesses may be issued.

Par. (b). The place of sequestration may be such that the prospective witnesses

- (1) cannot hear a *testifying witness*;
- (2) and cannot consult with *each other*;

¹ The majority of Courts add this bracketed clause; a few Courts and some statutes adopt the safer rule of making the order *demandable as of right*.



(3) and cannot consult with a witness who has *left the stand*;

[(4) and cannot consult with an *attorney in the case*.]¹ but in any case the first of these is essential; and in any case the order may be modified as the judge may think fit.

ART. 3. *Persons included in the Order.* The persons to be
1318 included in the order of sequestration may be any prospective witness,

subject to such exceptions as the judge may authorize,² and subject to the following rules in the absence of such authorized exceptions:— (W. § 1841.)

1319 *Par. (a).* The *party demanding* the sequestration cannot as of right insist on the *inclusion* of specific persons in the order.

1320 *Par. (b).* The *party against whom the demand is made* cannot as of right insist on the *exemption* of specific persons from the rule;

(1) *except* for his *attorney or counsel* actively engaged in the conduct of the trial;

[(2) and *except for himself the party*;]³ [[but in such case the judge may require the party so exempted to testify first of the witnesses on his side]].⁴

Cross-reference. For the rule of some States requiring a party to testify first in all cases, see Rule 163, Art. 1 (*post*, § 1353).

1321 ART. 4. *Disqualification for Disobedience.* The judge may exclude from testifying a person who has knowingly disobeyed an order of sequestration, [provided the party for whom he is offered has connived at the disobedience].⁵— (W. § 1842.)

¹ There is difference of ruling here.

² It is generally conceded, except as noted in *Par. (b)*, that the trial Court's discretion controls.

³ The great majority of Courts and statutes accept this clause.

⁴ This should be added, to lessen the dangers of the foregoing clause; but it is not law except in Tennessee.

⁵ A large minority of Courts add this proviso.

SUB-TITLE V:

DISCOVERY OF EVIDENCE BEFORE TRIAL TO THE
OPONENT

1325 **RULE 161. General Principle.** Whenever a party has been
duly called upon before trial, by the opponent, in pursuance
of the following rules [or by special order of Court],¹ to dis-
close before trial

- (1) the contents of any *document*,
- (2) or, the *name* of any *witness*,
- (3) or, the *tenor* of his *own testimonial knowledge*,
- [(4) or, the *tenor* of any other *expected witness' testimony*,
- (5) or, the *nature* of any *expected evidential fact*,]¹ and

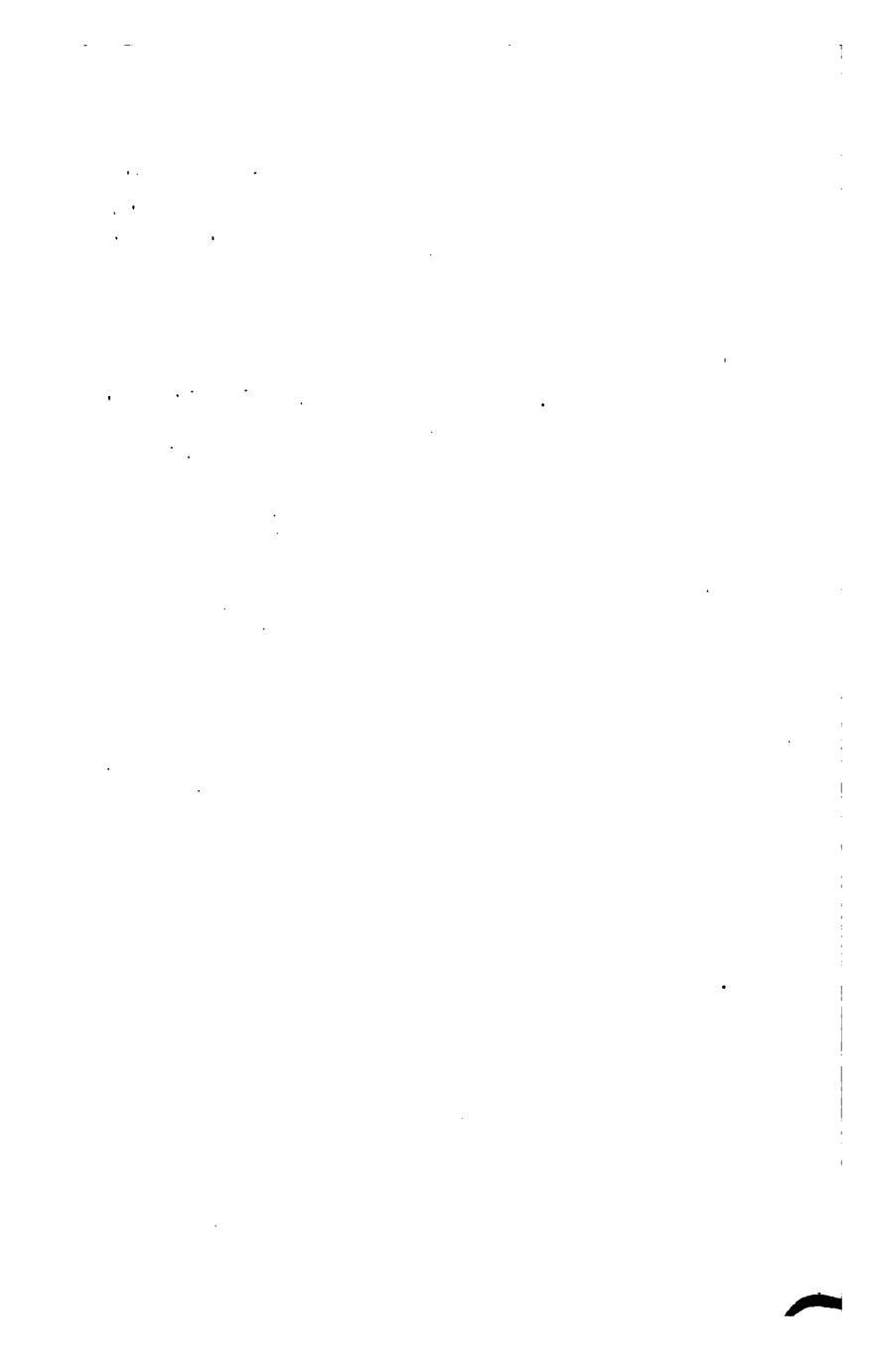
fails to comply, the evidence thus withheld may be excluded
by the Court, if offered by the party at the trial; [and the
Court may further compel obedience to the order or may
direct a nonsuit or a default or may strike out a pleading, as
seems fit].² — (W. §§ 1845-1847.)

(Reason and Policy. The disclosure, before trial, of the in-
formation which a party possesses, involves the risk that an
unscrupulous opponent will tamper with witnesses or manu-
facture counter-evidence. This risk, however, does not apply
to the party's own testimony, nor to documents, chattels, or
premises having evidential uses. But the advantages of such
disclosure are important. In fairness, it enables an opponent
to protect himself against falsities and to search for counter-
evidence. In larger aspects, it tends to diminish misguided
litigation, by exposing to each of the parties the respective
strengths and weaknesses of their cases. In these respects
it is an essential feature of sound policy as are the pleadings
themselves. The law has gradually come to enlarge the scope
of this compulsory discovery before trial.)

1326 [ART. 1. *Circumstantial Evidence.* Wherever any fact
circumstantially evidential is inadmissible partly or wholly

¹ These clauses are not yet law. The scope of discovery
thus far is recognized for the first three classes only, and
under specific rules, not entirely in the Court's discretion.

² Courts and statutes do not all recognize these several
modes as available, except in chancery.



because of the risk of unfair surprise, i. e. the risk that, if the testimony to it were false, the opponent for lack of prior notice of its offer would be at the trial unprepared to refute its falsity, the party desiring to offer it may do so if he has before the offer given to the opponent such notice as the Court may deem reasonable and if the Court finds no other policy violated by the evidence.

This rule is applicable to offers of

(1) particular misconduct to *impeach the character* of a witness, under Rule 101 (*ante*, § 532),

(2) particular *errors of testimony* to impeach a witness, under Rule 107 (*ante*, § 567),

(3) particular acts to evidence the *character* of any person, other than the accused in a criminal case, or the *intent, motive*, etc., of any person, under Rules 43 to 68 (*ante*, §§ 218-336),

(4) particular events, instances, etc., to show the nature or condition of a *place or thing*, under Rule 73 (*ante*, § 344).]]¹
— (W. § 1849.)

1327 ART. 2. *Testimonial Evidence in Criminal Cases.* In a criminal cause, the accused shall be furnished, on application after indictment found, [or information filed,] a list of the witnesses for the prosecution; subject to the following exceptions and distinctions: — (W. §§ 1851-1854.)

1328 *Par. (a).* The list shall *include the names and addresses*
²[of the witnesses examined before the grand jury.]

³[or, for an information, of the witnesses known to the prosecuting attorney at the time.]

⁴[of all the witnesses intended to be used on the trial.]

1329 *Par. (b).* The *time and mode* of furnishing the list shall be

¹ This is not law anywhere, but ought to be, so as to give flexibility to the existing rules.

² Almost all States make this provision.

³ About ten States provide thus. It is complementary to the first clause.

⁴ This is the English and Federal rule, followed in two or three States. It is exclusive of the other two clauses.



¹[at the time of returning the indictment, by filing the list therewith.]

²[or, for an information, at the time of filing it, by filing the list therewith, and later, by filing a supplementary list of witnesses later known to him, on application by the accused, or at such times as the rule of Court prescribes.]

³[on application by the accused at any time after indictment returned.]

1330

Par. (c). The trial Court has *discretion to admit* any person as witness whose name as a possible witness was before trial known to the accused, or whose testimony would for any other reason not cause unfair surprise; this rule may be applied to admit

⁴(c) (1) A person who was examined before the grand jury and therefore ought to have been listed, under *Par. (a)*, but was not; ⁵

(2) A person who was not examined before the grand jury, and therefore need not have been listed, under *Par. (a)*, and was not; [and in such case his admission as a witness shall be as of right].⁶ — (W. §§ 1852, 1855.)

⁷(cc) (1) A person who was known to the prosecuting attorney, and therefore ought to have been listed, under *Par. (a)*, but was not; ⁸

(2) A person who was not known to the prosecuting attorney, and therefore need not have been listed, under *Par. (a)*.⁹ — (W. § 1853.)

¹⁰(ccc) A person whose name was not upon the list furnished, or was so misdescribed as not to be identi-

¹ This clause belongs with the first clause of *Par. (a)*.

² This belongs with the second clause of *Par. (a)*.

³ This belongs with the third clause of *Par. (a)*. The time varies in each statute.

⁴ This clause belongs with the first clause of *Par. (a)*.

⁵ Two or three States, anomalously, deny this.

⁶ A large minority of Courts thus treat Cl. (2).

⁷ This belongs with the second clause of *Par. (a)*.

⁸ A few Courts possibly deny this.

⁹ None deny this..

¹⁰ This belongs with the third clause of *Par. (a)*.



fiable; and in such case the witness shall be excluded as of right;¹

but where no list at all was furnished, and the accused might have had it upon motion before trial, no witness shall be excluded for this reason. — (W. § 1854.)

1331 [[*Par. (d).* The prosecution may on motion obtain before trial a list of the accused's expected witnesses.]]²

1332 ART. 3. *Testimonial Evidence in Civil Cases.* In any civil case a judge may on motion of a party order any other party before trial to make disclosure of the following sorts:³ — (W. § 1856.)

Par. (a). The *personal testimony* and admissions of the examined party;

1333 [[*Par. (b).* The names of his expected witnesses;]] ⁴

1334 [[*Par. (c).* The important evidential facts expected to be offered.]] ⁵

1335 [ART. 4. *Documents.* In any civil case a judge may on motion by a party before trial order any other party to allow an inspection, by the first party or his attorney or witnesses, or to furnish a copy, or to do both, as to any document in his control relating to any matter in question in the cause, except so far as any privilege would prevent disclosure at the trial, and except so far as the judge may deem the dis-

¹ This is law, but is unsound; the trial Court's discretion ought equally here to control.

² This is not law anywhere; but it ought to be.

³ This is covered by statutes and rules of court having varying details not here represented.

⁴ No Court or statute does this; but why not?

⁵ Few Courts, if any, go this far.



closure unnecessary for the purposes of justice.]¹ — (W §§ 1857-1859.)

- 1336 [Par. (a). The party on whom the order is asked may be required also to state what documents are in his possession and what is his knowledge as to the whereabouts of any document.]²

Distinctions. (1) Whether there is a *party's privilege at the trial* to withhold documents is dealt with in Rule 201, Art. 8 (*post*, § 1702); the privilege at trial is much rarer and narrower than the right to withhold disclosure before trial.

(2) A *notice to produce* an original, under Rule 126, Art. 5 (*ante*, § 764), merely serves to allow the notifier to use a copy at the trial, if the original is not produced by the opponent.

(3) The *non-production* of a relevant document in a party's control may permit a circumstantial *inference as to its unfavorable contents*, under Rule 118, Art. 6 (*ante*, § 658), even though no order or request has been made under the present rule.

(4) A rule requiring a copy of a document to be *annexed to the party's pleading* is a rule of pleading, not here involved.

- 1337 [Par. (b). A party, even though not ordered or requested before trial, may be required to furnish to the other party, a reasonable time before trial, a copy of a document in a *third person's possession*, as a condition precedent to using such a copy in evidence, in the following classes of documents:

- (1) Recorded deeds;
- (2) Abstracts of title.]³

- 1339 [ART. 5. *Premises, Chattels.* In any civil case a judge may on motion by a party before trial order any other party to allow the detention, preservation, inspection, or sampling,

¹ Nearly every State has a statute similar to this, though none are worded precisely as above. The Federal statute and a few others have sometimes been construed not to compel any disclosure before trial. The scope of the disclosure is unwisely limited, in some jurisdictions, to documents affecting the applicant's case; here preserving the chancery rule.

² This is attainable under Art. 3, but ought equally to be available here, and is so, by some statutes.

³ In several States a statute of this sort is found.



(1) of any place or thing relating to a matter in the cause,
(2) by a party or his attorney or expected witnesses,
except so far as any privilege would prevent disclosure at
the trial, and except so far as the judge may deem the dis-
closure unnecessary for the purposes of justice.]¹ — (W.
§ 1862.)

Cross-reference. For a similar provision giving to the judge
the power to order, on his own motion, such inspection by
expert witnesses called by the judge, see Rule 224, *post*, § 1990.

1340 *Par. (a).* The inspection of the *body* of the opponent
party before trial may be ordered, as provided in Rule
208, Art. 8 (*post*, § 1702).

1341 ART. 6. *Application of these Rules to Third Persons.* A
party may not obtain inspection, production, or testimony
before trial, in the foregoing manner, from a third person not
a party to the cause;

subject to the following exceptions and distinctions:

Par. (a). The *testimony* of a third person may be
obtained

(1) *After suit begun*, by deposition taken *de bene*
for the causes specified in the Code of Procedure; but
not otherwise. — (W. § 1856, n. 5.)

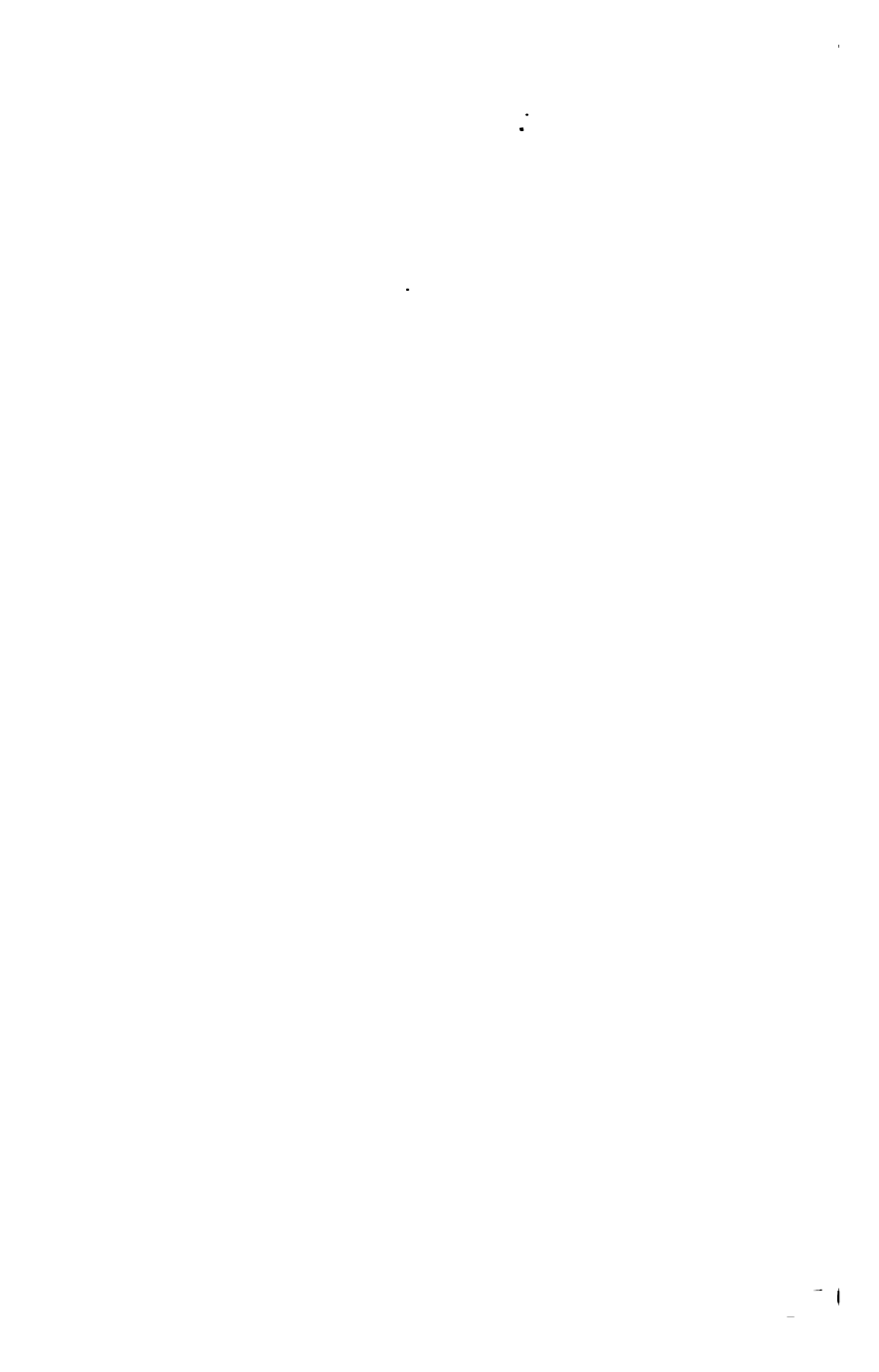
[(2) *Before suit begun*, on motion granted by judge,
when the third person is expected to be made a party
and his knowledge is necessary to enable suit to be
begun.]²

1342 [*Par. (b).* A *document* in the control of a third person
may on motion be ordered to be produced or to be sub-
mitted for inspection or copy or both, after suit begun,
whenever the judge deems it useful for the purposes of
justice, and except so far as any privilege would prevent
disclosure at the trial].³ — (W. § 1858, n. 17, § 1859,
n. 15.)

¹ British jurisdictions and a few American States have such
a statute; the phrasings vary. Chancery powers would suffice
without statute.

² This is a matter of chancery practice seldom covered by
statutes.

³ This is the law in a few jurisdictions only, but ought to be
everywhere.



- 1343 [Par. (c). A *place* or *thing* in the control of a third person may on motion and order be subjected to detention, preservation, inspection, or sampling, on the same conditions as in Par. (b)].¹ — (W. § 1862.)

- 1344 [[ART. 7. *Application of these Rules to Criminal Cases.* The foregoing rules of Articles 4 to 6 are applicable in criminal cases, except so far as the privilege against self-crimination prevents.]]² — (W. § 1858, n. 16, § 1862, n. 8.)

Cross-reference. For the bearing of the privilege against self-crimination, see Rule 203 (*post*, § 1730).

- 1345 ART. 8. *Document Used but not Offered at Trial.* A party having a *document at the trial*, and intending to use it in evidence, must permit the opponent, on request, to inspect it even before formal offer, in the following cases: — (W. § 1861.)

(1) When it is shown to a witness to *aid his recollection*, under Rule 88 or Rule 89 (*ante*, §§ 431, 444);

(2) When it is shown to a witness to *identify or authenticate*, and the opponent desires to cross-examine the witness as to the document.

Distinguish (1) the rule that the *opponent's inspection* of a document produced on demand for his use makes the *whole of the* document evidence (Rule 187, *post*, § 1589).

(2) the rule that a document used to *impeach a witness* by an inconsistent statement must be *shown to the witness* before asking him about it (Rule 127, Art. 4, *ante*, § 812).

¹ This is as yet law in probably British jurisdictions alone. But it is a sensible rule, much needed in many classes of litigation.

² Presumably none of the rules would now be applied in criminal cases. But why not? Moreover the accused would equally obtain the benefit of them against the prosecution.



TITLE IV:

SIMPLIFICATIVE RULES

SUB-TITLE I:

ORDER OF INTRODUCING EVIDENCE

RULE 162. *General Principle.* In introducing any particular witness or any particular topic or piece of evidence, the time thereof, with reference either to the stage of the case or of a witness' examination or to the introduction of any other evidence, is determined by the trial judge, under the circumstances of the particular case.¹ — (W. § 1867.)

Subject to an express ruling by the trial judge, the provisions of Rules 163 and 164 (*post*, §§ 1352-1380) are to be observed for this purpose.

(*Reason and Policy.* Some conventional order for the introduction of evidence is desirable; first, to make the mass of evidence more intelligible to the tribunal; secondly, to make it possible for the parties to prepare themselves to meet the opponent's case; and, thirdly, to check the laxity which heedless and incompetent counsel would indulge in if not forced by rules to be orderly. Nevertheless, the varieties of situation in each litigation are such that a rigid system of rules would too frequently suppress valuable evidence; hence a safeguard must be provided in the trial Court's discretion. Further, to avoid the injustice and expense of new trials for relatively minor reasons, this discretion must be absolute.)

ART. 1. *Waiver.* Either party may by express or implied waiver lose the use of any of the ensuing stages of evidence, or the order of evidence regularly provided therefor; and in such a case the trial Court's ruling is necessary for restoring the rule thus waived.²

¹ This is universally conceded in theory, but seldom practically enforced by Supreme Courts. It is merely a special extension of Rule 18 (*ante*, § 49).

² There is little authority; but the subject ought to be thus regulated.



TOPIC A:

ORDER OF EVIDENCE IN STAGES OF THE WHOLE CASE

RULE 163. *General Principle.* (1) The stages of the whole case, for the introduction of evidence by the respective parties, are as follows:

1. *Putting in the Case at Large.*
 - a. Proponent's Case in Chief.
 - b. Opponent's Case in Reply.
 - c. Proponent's Case in Rebuttal.
 - d. Opponent's Case in Rejoinder.
2. *Case Closed.*
 - a. By proponent.
 - b. By opponent.
3. *Argument begun.*
4. *Charge given.*
5. *Jury retired.*

(2) The general rule for the time of introduction of evidence is that all evidence must be introduced at the earliest stage when it is appropriate and feasible to introduce it; and, conversely, that at a later stage evidence is not admissible which was appropriate and feasible to introduce at any earlier stage. — (W. § 1866.)

(*Reason and Policy.* There are three possible methods of dealing with the stages of the case. One is to make no rules, but to allow the parties at any time to rebut the topic momentarily brought out by a witness, each interrupting the other in turn and irregularly. A second and opposite method is to allot only two fixed stages, obliging first one party to put in all of his evidence, and then the other to put in all of his. The third is to oblige each party to put in at once all that is then appropriate, and to permit at a later stage that evidence only which has been made necessary to rebut the opponent's intervening evidence. The last is the method of our law. It purports to obtain the maximum of clearness with the minimum of rigidity.)

ART. 1. *Specific Rules applicable to Either Party.* The following rules apply to specific topics and witnesses irre-

1

spective of the party's stage of the case:— (W. §§ 1869, 1870.)

1354 *Par. (a).* In *treason*, the overt act must be evidenced as provided in Rule 179, Art. 1 (*post*, § 1503).

1355 *Par. (b).* In other *criminal cases*, the *corpus delicti* must be evidenced as provided in Rule 181, Art. 2 (*post*, § 1536).

1356 *Par. (c).* In evidencing a *co-conspirator's admissions*, the conspiracy must be evidenced as provided in Rule 21, Art. 2 (*ante*, § 687).

1357 *Par. (d).* In evidencing a *copy* of a *document*, the *loss* and *execution* of the original must be evidenced as provided in Rule 126, Art. 2 (*ante*, § 751).

1358 [*Par. (e).* In using a *party* as witness, he must testify first of the witnesses on his side.]¹

Cross-reference. For the rule that the party must testify first if he does not go out with the other witnesses when *sequestered*, see Rule 160, Art. 3 (*ante*, § 1318).

1360 ART. 2. *Same: Conditional Relevancy.* Where two or more evidential facts are so connected, under the issues, that the relevancy or the materiality of one depends upon another not yet evidenced, and the party is unable or unwilling to introduce them both at the same moment, the following rules apply:— (W. § 1871.)

Par. (a). If the fact offered has an apparent relevancy or materiality to the case, it is admissible unconditionally.

Par. (b). If the fact offered has no apparent relevancy or materiality, the offering counsel may be required by the Court, as a condition precedent,

(1) to state the supposed connecting facts,

(2) and to promise to evidence them later.

except that a counsel cross-examining need not make such a statement.

¹ A few States so provide.

Par. (c). If a promise thus made is not fulfilled, the Court may strike out the evidence thus conditionally admitted, if a motion is made by the opposite party.¹

Illustration. In an action to set aside a deed made in fraud of creditors, the plaintiff claiming as assignee of the creditors' grantee M, the judgment and the execution-deed may be evidenced first, because their connection is apparent, and the deed from M to the plaintiff can be evidenced later. But if the plaintiff offered to evidence admissions of K that the land was sold in fraud of creditors, these would be apparently irrelevant, and the plaintiff might be required to state that K was said to be the defendant's agent to transfer to R in fraud of the creditors and to promise the introduction of such evidence.

1361 *ART. 3. Proponent's Case in Chief.* In the proponent's case in chief all facts and witnesses relevant to sustain his allegations in the issues as defined by the pleadings must then be introduced (pursuant to the general Rule above). — (W. § 1873.)

1362 *ART. 4. Opponent's Case in Reply.* The facts and witnesses relevant

(1) to sustain the allegations of the opponent in the issues as defined by the pleadings, and

(2) to deny or to explain away the evidential facts of the proponent adduced to sustain his allegations, are to be introduced according to the following rules:— (W. § 1872.)

1363 *Par. (a).* None may be introduced by the opponent until the proponent has finished his case in chief,

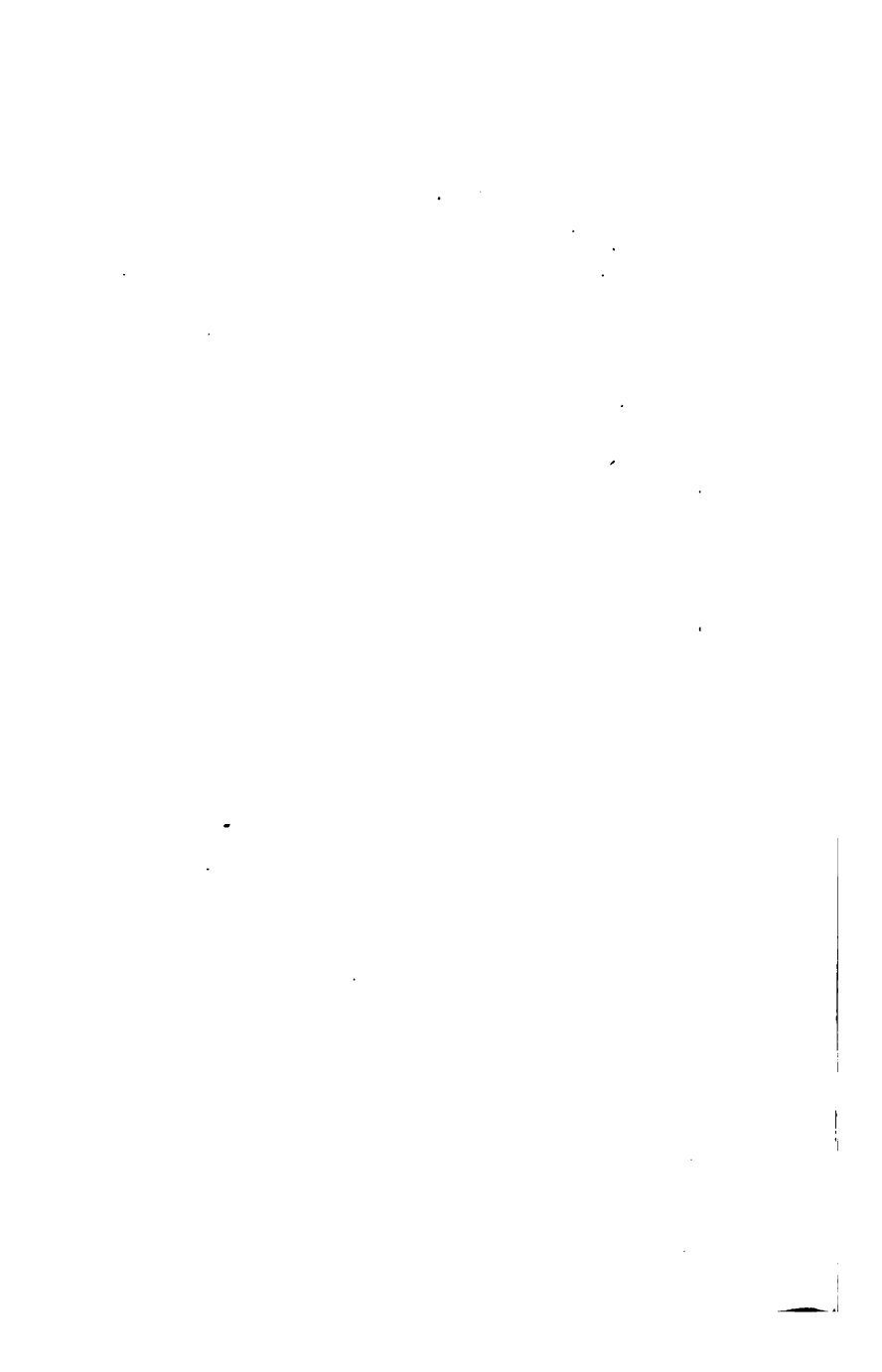
(1) except that he may do so on cross-examination of a witness of the proponent, as provided by Rule 164, Art. 4 (*post*, § 1376),

(2) and except that he may read the remainder of a document partly read by the proponent, as provided by Rule 185 (*post*, § 1575).²

1364 *Par. (b).* All must be introduced during the opponent's case in reply and without reserving any for a later stage.

¹ In perhaps a few Courts no motion is required; but this is unsound.

² There is little authority; but this is fair.



ART. 5. *Proponent's Case in Rebuttal.* The proponent may
1365 in his case in rebuttal introduce facts and witnesses appropriate to deny, explain, or discredit the facts and witnesses adduced by the opponent;

but not any facts or witnesses which might appropriately have been introduced in the case in chief. — (W. § 1873.)

Illustration. In probating a will, the proponent is entitled to a presumption of sanity of the testator, on evidence of the testator's due execution of the document; hence, he need not in his case in chief introduce any witness to sanity; and hence, if the opponent disputes the sanity and introduces evidence on that issue, the proponent may introduce witnesses to sanity, in his case in rebuttal, for that is the first appropriate stage. But if, by the rule in a few States, the proponent raises no presumption of sanity by merely the evidence of execution, and must also introduce some express testimony to sanity, this is an appropriate stage for all his evidence of sanity, and it must then be introduced, leaving for rebuttal that only which is specifically needed in rebuttal.

ART. 6. *Opponent's Case in Rejoinder, and Subsequent*
1366 *Stages.* In the opponent's case in rejoinder, and in subsequent stages for either party, facts and witnesses may be introduced which are appropriate to deny, explain, or discredit the facts and witnesses adduced by the opponent in the next preceding stage of the case; but no others. — (W. §§ 1874, 1875.)

ART. 7. *Case Closed, Argument Begun, etc.* Neither party
1367 shall introduce any facts or witnesses

Par. (a) after he has declared his evidence to be all introduced and his case closed; — (W. §§ 1876, 1877.)

Par. (b) after the argument is begun; — (W. § 1878.)

Par. (c) after the judge's charge is given; — (W. § 1879.)

Par. (d) after the jury has retired. — (W. § 1880.)

TOPIC B:

ORDER OF EVIDENCE IN THE EXAMINATION OF AN INDIVIDUAL WITNESS

RULE 164. *General Principle.* (1) The stages of examina-
1369 tion, for the testimony of an individual witness, are as follows:



1. *Original Call*

- a. Direct examination (by the proponent).
 - b. Cross-examination (by the opponent).
 - c. Re-direct examination.
 - d. Re-cross-examination
- and so forth.

2. *Recall*

- a. For direct examination.
- b. For cross-examination.

3. *Re-call*; and later recalls.

(2) The general rule for the order of examination of all witnesses and of individual witnesses is as follows:

1370 *Par. (a).* Each witness shall be examined by *completing all the stages* before another witness is called.

1371 *Par. (b).* In each stage of examination all matters *appropriate to that stage* must be completely examined, and, conversely, no matters can be examined at a later stage which were appropriate at an earlier stage. — (W. § 1882.)

(Reason and Policy. There are three possible methods of allotting the stages of examination. One is to fix no rule, but to allow either party to interrupt the other's examination by asking questions bearing on those just answered, or to call another witness on the same topic, thus aiming at continuity of topics. A second is to allow each party to finish his examination of all his witnesses, before the other party examines any of them. A third is to require each party to finish his examination of each witness, so far as possible before any other witness is called. The third is the method of our law, and aims at obtaining the maximum of continuity of topics consistent with the orderly disposal of each witness' testimony.)

1372 **ART. 1. *Rules applicable to Specific Topics.*** The following rules apply to specific topics irrespective of the party or stage of examination:

Par. (a). Where the *execution of a document* is sought to be evidenced, and a witness has testified to the execution of the document shown to him for the purpose, it must be offered in evidence before the close of that stage of examination of the witness, in order that the other party

may have an opportunity to examine upon it before the witness leaves.¹ — (W. §§ 1883, 1884.)

ART. 2. *Rules applicable to Stages in general.* The following rules apply to the stages in general, irrespective of parties:

1373 *Par. (a).* A party who *waives* the use of a stage of the examination will not lose it under Rule 162, Art. 1 (*ante*, § 1351), if he expressly reserves it for a specified later time. — (W. § 1884.)

1374 *Par. (b).* Where there are *two or more parties* on one side, there is no specific rule for the order of their examinations. — (W. § 1884.)

Cross-reference. For the rule as to *number of examiners* for a single party, see Rule 92, Art. 5 (*ante*, § 473).

1375 ART. 3. *Direct Examination.* On the direct examination the calling party must by his questions seek to obtain all the testimony which that witness is qualified to give in support of the party's allegations on the issues as defined by the pleadings (pursuant to Par. 2 (b) of the general Rule above). — (W. § 1883.)

1376 ART. 4. *Cross-examination.* On the cross-examination, the party may by his questions seek all facts tending to impeach the personal credit of the witness under Rules 96-122 (*ante*, §§ 500-724);
and, in addition,

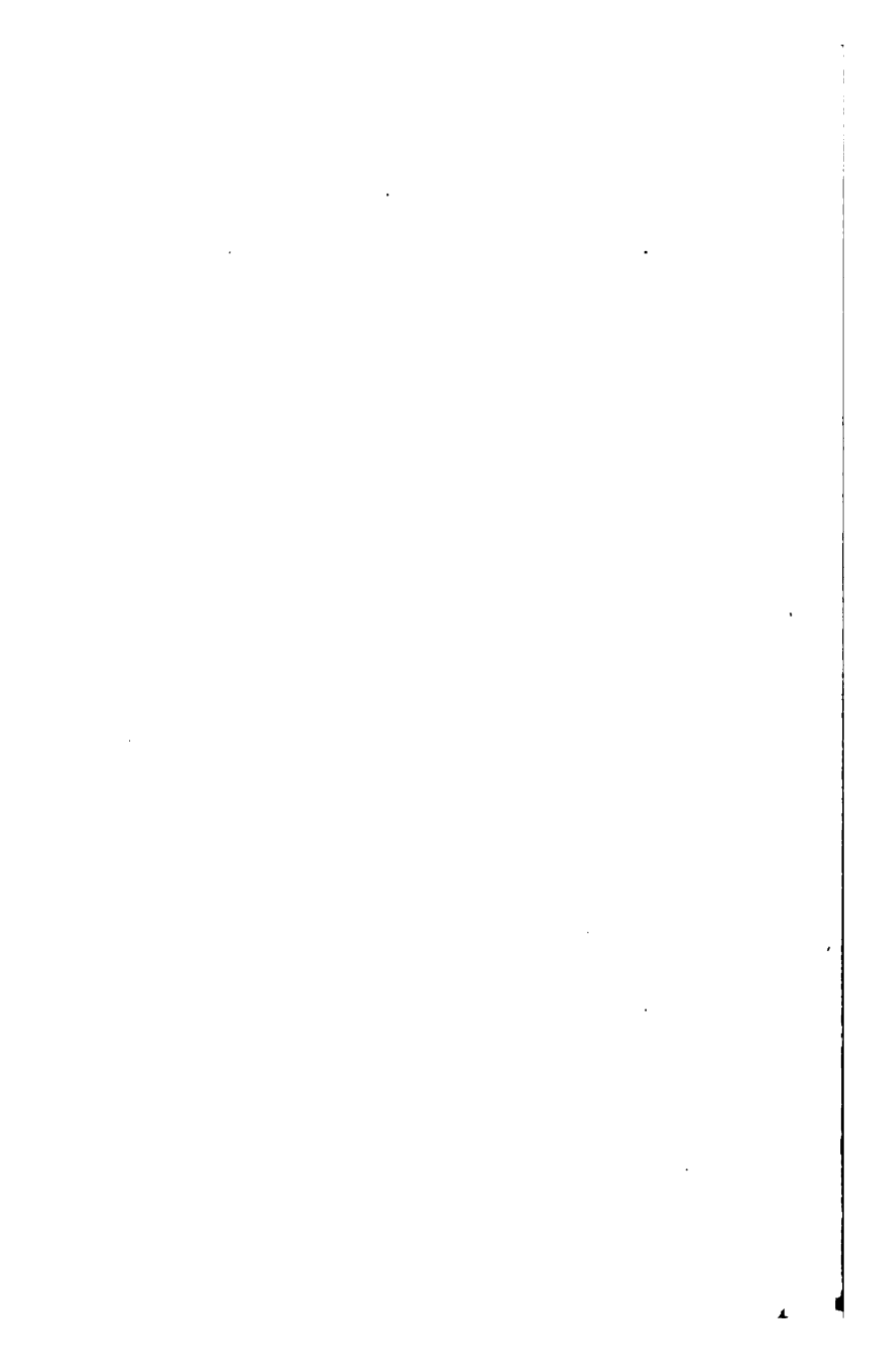
(a) ² [All facts *referred to by the witness* in his direct examination, and no others.]

(aa) ² [All facts connected with the matters *referred to by the witness* in his direct examination, and no others.]

(aaa) ² [All facts which tend to disprove, modify, or

¹ There is little authority here, but it supports this rule of fairness.

² These are three varieties of the inferior and quibbling rule accepted in many States.



explain the facts *referred to by the witness* on his direct examination, and no others.]

(b) ¹ [All facts which *tend to disprove, modify, or explain the proponent's case*, and no others.]

(c) ² [All facts material and relevant to the issues, including facts relating to the cross-examiner's *own affirmative case*.] — (W. §§ 1885-1890.)

Illustration. In an action on a note made to M and indorsed to P, with a plea of fraudulent representations by M and notice by P, the making of the note is evidenced by M, testifying on direct examination to the single fact of its signature being the defendant's. On cross-examination, the defendant under Forms (a), (aa), and (aaa), cannot question M as to the fraud and the notice; under Form b, he might question him as to the fraud but not as to the notice; under Form c he could question him as to the whole case.

Cross-references. (1) The exclusion of hearsay statements for *lack of the opportunity to cross-examine* is dealt with in Rule 135 (*ante*, § 913).

(2) The *kinds of discrediting facts* admissible to *impeach a witness' character*, but only on cross-examination, are dealt with in Rule 105, Art. 2 (*ante*, § 552).

(3) The *form and manner of questions* put on examination (leading, misleading, abusive, etc.) are dealt with in Rule 92 (*ante*, §§ 461-475).

(4) The *accused's waiver of privilege* so as to be compellable to answer on cross-examination is dealt with in Rule 203, Art. 6 (*post*, § 1749).

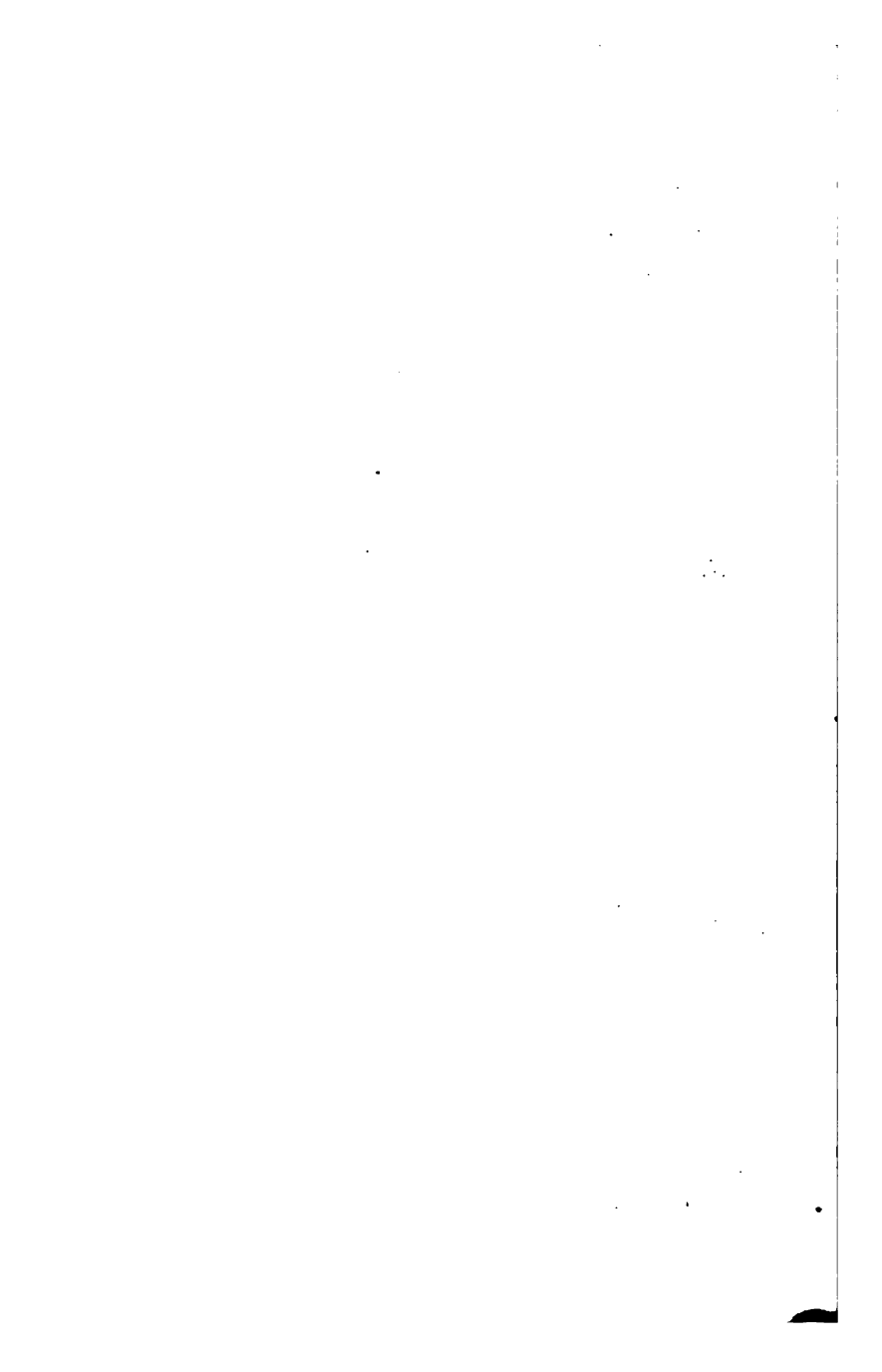
1377 [Par. (a). The opponent, when prevented by Clauses (a), (aa), (aaa), or (b), in Art. 4, from cross-examining on certain facts, may seek them by *calling the witness for direct examination* at the later stage of putting in his own case.] ³

Cross-reference. The Rules which would then affect him in dealing with the witness are the rule against *impeaching one's own witness* (Rule 97, Art. 5, *ante*, § 509) and the rule against *leading questions* (Rule 92, Art. 1, *ante*, § 462).

¹ This is the medium form of rule, used in some States.

² This is the orthodox common-law rule, the only sound one; it obtains in the large minority of States.

³ This rule is unnecessary for Courts following Clause c.



1378 [Par. (b). For an opponent desiring under Clause (c) to cross-examine for facts relating to his own case, the witness is deemed to have reached the stage for cross-examination

if he has been *questioned* by the other party and *made* an admissible *answer*,

or if he has produced a document and has made an answer tending to prove it;

but not otherwise.] ¹ — (W. §§ 1892-1894.)

ART. 5. *Re-Direct Examination; Re-Cross-Examination.*

1379 On a re-direct examination and a re-cross-examination the party may seek by his questions to obtain such testimony as tends to deny, modify, or explain the facts answered in the next preceding stage of examination; and no others. — (W. § 1896.)

Cross-references. (1) For the rule as to *repetition of the same questions*, see Rule 92, Art. 4 (*ante*, § 469).

(2) For the admissibility of irrelevant facts to *explain irrelevancies introduced on cross-examination*, see Rule 17 (*ante*, § 46).

(3) For the admission of the *whole of a conversation*, see Rule 185 (*post*, § 1575).

(4) For the classes of facts admissible to *support a witness' credit*, see Rules 109-114 (*ante*, §§ 595-628).

1380 Par. (a). Stages after the first re-direct and the first cross-examination are allowable on a ruling by the trial Court under Rule 162 (*ante*, § 1350).² — (W. § 1897.)

1381 ART. 6. *Recall.* After the stages of a witness' examination are declared by counsel to be closed, a recall for re-direct or for re-cross-examination is allowable only on a ruling by the trial Court under Rule 162 (*ante*, § 1350); — (W. §§ 1898-1900.)

(1) *except* where a party, for putting facts relating to his own case, under Art. 4 above, calls for the first time a witness already examined by the other party;

(2) and *except* where a party seeks, before impeachment by self-contradiction, to put the question required by Rule 108, Art. 3 (*ante*, § 579).

¹ This rule only comes into application under Clause c above.

² There is little authority; but this is a fair rule.



SUB-TITLE II:

SUNDRY RULES TO AVOID
CONFUSION OF ISSUES OR UNDUE PREJUDICE

TOPIC A: CIRCUMSTANTIAL EVIDENCE

1383 **RULE 165.** *General Principle of avoiding Excessive Confusion of Issues.* Wherever the admission of a particular class of relevant evidential facts would tend, by reason of the amount of evidential data, the complication of subordinate issues, or the length of time spent on relatively minor details, to obstruct the tribunal's ascertainment of the truth, either by unduly distracting attention from the substantial issues, or by unnecessarily confusing or obscuring them,

the evidence may be, in a general class of cases or in a particular case,

(1) admitted with limitations or conditions,

(2) or excluded. — (W. § 1904.)

1384 **ART. 1.** *Operation with other Principles.* The present Rule, and Rule 161 (*ante*, § 1326; discovery before trial, to prevent unfair surprise), and Rule 166 (*post*, § 1390; rule to avoid undue prejudice), or all three, may operate together to effect such exclusion or limited admission, even though no one of the principles would by itself have sufficed to that effect. — (W. § 1904.)

1385 [ART. 2. *Trial Court's Determination.* The application of the present Rule, alone or in combination with Rule 161 or Rule 166, may in any case be made by the trial Court, acting on the circumstances of each case.]¹

1386 **ART. 3.** *Specific Applications of the Rule.* To the following classes of evidence, this Rule, alone or together with Rule

¹This is law in Massachusetts and New Hampshire, for some of the rules under Art. 3; but otherwise it is presumably not law, though it ought to be.

161 or Rule 166, is applicable as elsewhere defined in this Code:

Par. (a). Particular acts of misconduct, to evidence the *moral character* of a party (Rules 42-49, *ante*, §§ 215-239).

Par. (b). Particular criminal acts, to evidence *intent, knowledge, motive*, etc. (Rule 65, *ante*, § 297, Rule 67, *ante*, § 322).

Par. (c). Particular events or instances to evidence the *nature* of a *machine, highway*, or the like (Rule 73, *ante*, § 344).

Par. (d). Particular acts of misconduct, to evidence the *moral character* of a *witness* (Rules 101, 105, *ante*, §§ 532, 549).

Par. (e). Particular errors, to evidence the *general incredibility* of a witness (Rules 107, 108, *ante*, §§ 567-591).

RULE 166. General Principle of avoiding Undue Prejudice.

1390 Wherever the admission of a particular class of relevant evidential facts would tend, by stimulating an excessive emotion or a fixed prejudice as to a particular subject or person involved in the issues, to dominate the mind of the tribunal so as to prevent a rational determination of the truth, and the evidence having this tendency is not important to the ascertainment of the truth,

the evidence may be, in a general class of cases or in a particular case,

(1) admitted with limitations or conditions,

(2) or excluded. — (W. § 1904.)

1391 **ART. 1. Operation with Other Principles.** The present Rule, and Rule 161 (*ante*, § 1326; discovery before trial to prevent unfair surprise) and Rule 165 (*ante*, § 1384; rule to avoid excessive confusion of issues), or all three, may operate together to effect such exclusion or limited admission, even though no one of the principles would by itself have sufficed to that effect. — (W. § 1904.)

§§ 1392-1401 LIMITING NUMBER OF WITNESSES

[ART. 2. *Trial Court's Determination.* The application of
1392 the present Rule, alone or in combination with Rule 161 or
Rule 165, may in any case be made by the trial Court, acting
on the circumstances of each case.]¹

ART. 3. *Specific Applications of the Rule.* To the following
1393 classes of evidence this Rule, alone or together with Rule 161
or Rule 165, is applicable as elsewhere defined in this Code:

Par. (a). *Moral character*, to evidence the doing of an
act (Rules 30-33, *ante*, §§ 130-152).

Par. (b). *Particular acts of misconduct*, to evidence the
moral character of a party (Rules 42-49, *ante*, §§ 215-239).

Par. (c). *Particular acts of misconduct* to evidence
intent, knowledge, motive, etc. (Rule 65, *ante*, § 297, Rule
67, *ante*, § 322).

Par. (d). *Particular acts of misconduct*, to evidence a
witness' moral character (Rules 101, 105, *ante*, §§ 532, 549).

Par. (e). *Autoptic preference of a corporal object* (Rule
123, *ante*, § 730).

TOPIC B: TESTIMONIAL EVIDENCE

RULE 167. *General Principle.* In pursuance of the principles
1400 of Rules 165 and 166, the testimony of one or more witnesses
may be excluded or may be admitted with limitations or
conditions, in the classes of cases herein specified. — (W.
§ 1906.)

ART. 1. *Witnesses merely Cumulative in Number.* Wherever
1401 an unlimited number of witnesses to the same issue would
cause excessive and unnecessary confusion of evidence, so
that the inherent value of their testimony for the ascertain-
ment of the truth would be relatively small in comparison
with the general obstruction thereby caused to the tribunal
in its determination of the controversy, the number of wit-

¹ See Note to § 1385.



§§ 1402-1404 LIMITING NUMBER OF WITNESSES

nesses may be limited, by ruling of the trial Court upon the circumstances of the case, — (W. §§ 1907, 1908.)

provided the limitation is applicable

- (1) only to the *same issue* of fact under the pleadings; ¹
- (2) *and*, equally to all parties in the case; ²
- (3) *and*, only after notice to the parties, [when feasible,] before the introduction of any testimony on the issue to which it relates; ³

but it need not be restricted

[(4) to issues uncontroverted]; ⁴

[or, (5) to issues collateral or subordinate]; ⁵

[or, (6) to issues where the other evidence is regarded as sufficiently convincing by the judge.] ⁶

In the following classes of issues, in particular, the limitation may be applied:

1402 *Par. (a).* Any issue permitting *expert testimony* under Rule 83 (*ante*, § 379). — (W. § 1908.)

Cross-reference. — For the *judge's power* to call expert testimony, see Rule 224, Art. 1 (*post*, § 1991).

1403 *Par. (b).* Any issue of *character* permitting testimony to reputation, under Rules 29 to 34 (*ante*, §§ 126-163). — (W. § 1908.)

1404 ART. 2. *Judge as Witness.* A judge who is qualified as a witness and is sitting in the trial of the cause may give testimony (under the conditions otherwise required by Rule 156, Art. 2, *ante*, § 1270);

provided that if the giving of the desired testimony would tend seriously to embarrass his impartial action as judge,

(1) he may of his own motion transfer the cause to another judge, postponing the trial if necessary;

¹ All Courts agree on this.

² All Courts agree on this.

³ Some Courts ignore the bracketed clause.

⁴ Some Courts hold the contrary.

⁵ Some Courts hold the contrary.

⁶ Some statutes provide the contrary.



[(2) or, he must, on motion by a party, transfer the cause to another judge.]¹ — (W. § 1909.)

ART. 3. *Juror as Witness.* A juror who is qualified as a
1405 witness and is sitting in the trial of the cause may give testimony (under the conditions required by Rule 156, Art. 1, ante, § 1266), and may after testifying return to the panel;

[provided that if the giving of the testimony would tend seriously to embarrass the juror or other jurors in the determination of the cause, the judge may

(1) declare the juror disqualified if he testifies;

(2) or, may refuse to permit him to testify].² — (W. § 1910.)

ART. 4. *Counsel or Attorney as Witness.* A counsel or
1406 attorney of record in the cause at trial, if qualified to testify, may give testimony (under the conditions required by Rule 156, Art. 3, ante, § 1271); — (W. § 1911.)

[provided that the trial Court

(1) may require the counsel or attorney to withdraw as such from the cause after testifying;

(2) or, may refuse to permit him to testify where the proposed testimony is not essential to the determination of the issue, or where the counsel or attorney could by diligence have avoided putting himself in the position of possessing useful testimony.]³

(Reason and Policy. The evil moral tendency of combining in the same person the functions of witness and advocate lies in the combination occurring habitually or frequently, because thereby the general conduct of the profession and the public respect for it is affected. The rule of evidence should therefore aim to discourage it as a habit, and to permit it only when unavoidable and indispensable.

¹ Some Courts have a rule practically equivalent; but it seems unnecessary.

² Some statutes have an equivalent provision.

³ Some Courts have a qualification corresponding in principle to this proviso.

the 1990s, the number of people with a mental health problem has increased by 50% (Mental Health Foundation 1999).

There is a growing awareness of the need to address the needs of people with mental health problems, and the importance of providing them with appropriate services. This has led to a number of initiatives, including the development of mental health services, the establishment of mental health trusts, and the implementation of mental health legislation. The aim of this paper is to review the current state of mental health services in the UK, and to discuss the challenges facing them in the future.

The paper is organized as follows. First, we discuss the current state of mental health services in the UK. Second, we discuss the challenges facing mental health services in the future. Third, we discuss the role of the mental health professional. Finally, we discuss the role of the patient.

The current state of mental health services in the UK

The current state of mental health services in the UK is characterized by a number of factors. First, there is a growing awareness of the need to address the needs of people with mental health problems. Second, there is a growing awareness of the importance of providing people with mental health problems with appropriate services.

Third, there is a growing awareness of the importance of providing people with mental health problems with appropriate services. Fourth, there is a growing awareness of the importance of providing people with mental health problems with appropriate services.

Fifth, there is a growing awareness of the importance of providing people with mental health problems with appropriate services. Sixth, there is a growing awareness of the importance of providing people with mental health problems with appropriate services.

Seventh, there is a growing awareness of the importance of providing people with mental health problems with appropriate services. Eighth, there is a growing awareness of the importance of providing people with mental health problems with appropriate services.

Ninth, there is a growing awareness of the importance of providing people with mental health problems with appropriate services. Tenth, there is a growing awareness of the importance of providing people with mental health problems with appropriate services.

Eleventh, there is a growing awareness of the importance of providing people with mental health problems with appropriate services. Twelfth, there is a growing awareness of the importance of providing people with mental health problems with appropriate services.

Thirteenth, there is a growing awareness of the importance of providing people with mental health problems with appropriate services. Fourteenth, there is a growing awareness of the importance of providing people with mental health problems with appropriate services.

Fifteenth, there is a growing awareness of the importance of providing people with mental health problems with appropriate services. Sixteenth, there is a growing awareness of the importance of providing people with mental health problems with appropriate services.

Seventeenth, there is a growing awareness of the importance of providing people with mental health problems with appropriate services. Eighteenth, there is a growing awareness of the importance of providing people with mental health problems with appropriate services.

Nineteenth, there is a growing awareness of the importance of providing people with mental health problems with appropriate services. Twentieth, there is a growing awareness of the importance of providing people with mental health problems with appropriate services.

Twenty-first, there is a growing awareness of the importance of providing people with mental health problems with appropriate services. Twenty-second, there is a growing awareness of the importance of providing people with mental health problems with appropriate services.

Twenty-third, there is a growing awareness of the importance of providing people with mental health problems with appropriate services. Twenty-fourth, there is a growing awareness of the importance of providing people with mental health problems with appropriate services.

Twenty-fifth, there is a growing awareness of the importance of providing people with mental health problems with appropriate services. Twenty-sixth, there is a growing awareness of the importance of providing people with mental health problems with appropriate services.

Twenty-seventh, there is a growing awareness of the importance of providing people with mental health problems with appropriate services. Twenty-eighth, there is a growing awareness of the importance of providing people with mental health problems with appropriate services.

Twenty-ninth, there is a growing awareness of the importance of providing people with mental health problems with appropriate services. Thirtieth, there is a growing awareness of the importance of providing people with mental health problems with appropriate services.

SUB-TITLE III:
OPINION TESTIMONY

TOPIC A:
OPINION, IN GENERAL

1410 } RULE 168. *General Principle.* A witness may not in his testimony state an inference (opinion) from observed data, provided the observed data on which the inference is based have been or can be reproduced and communicated to the jury, by the words and gestures of this witness or others, so fully, exactly and adequately, as a basis for the inference, that the witness' inference (opinion) is merely cumulative as an assistance to the jurors in the ascertainment of the truth¹. — (W. §§ 1918-1924.)

(*Reason and Policy.* The reasons for the Opinion rule are two. (1) The testimony is superfluous, and hence takes the time of the tribunal unnecessarily. But this reason is now void, for the time taken in applying the rule is so excessive that the waste of time is now caused by the rule itself, rather than by the lack of the rule. (2) Being superfluous, the cumulation of opinions of influential or numerous witnesses might be abused so as to influence the jury unduly by the opinions of the public. But this reason, of rare application, is easily corrected by the trial Court's discretion.

The following supposed reasons have no bearing. (1) Opinion *versus* fact. There is no such valid distinction in testimony. (2) Usurping the functions of the jury. No witness can usurp the functions of the jury; therefore the reason amounts to nothing.)

1411 ART. 1. *Rule applied to a Lay Witness.* If the subject of the testimony is one to which any lay witness would be qualified to testify under Rule 83 (*ante*, § 379), the rule admits his inference,

(1) when it is based upon the condition of a *corporal object* which cannot be *shown to the jurors* for that purpose,

¹ This rule is universally accepted, but ought to be abandoned. With it would go all the ensuing Rules 169-176. For a substitute, see Rule 168 A, *post*, § 1424.



in or out of court, in the same condition as it was when the witness observed it;

(2) *but not* when it is based on data *observed by the witness himself* but capable of being adequately communicated to the jurors, by words or gestures, as defined in the general Rule above.

(3) *nor* when it is based on matters stated to the jurors *in the testimony of other witnesses*.

1412 Par. (a). Where the inference is allowable to state, under Clause (2) above, the witness must nevertheless, *before stating it*, state such of the observed data as are capable of being communicated in words or gesture.

Illustrations. (1) A police officer is called to testify to the condition of a door in the house of a murder, and is asked whether from the appearance it was broken off from within or from without the house. This is an inference. If the door is or can be shown to the jurors in the same condition as when observed by the officer, his inference is not admissible.

(2) In the same case, the officer having heard human noises in the house as he approached, his inference that they were sounds of violent quarrel, not of pain or suffering, is admissible. But under Par. (a) he must first state all the data capable of being stated in words or other form.

(3) If another person in the same case has testified that he found the inside handle-knob to be missing, the officer's inference from this that the door was opened from the outside or the inside is not permissible.

Distinctions. (1) In Illustration (1) above, if the desired testimony were whether a cut in the door had been made by a chisel or by a gouge, the subject would presumably require an expert carpenter, under Rule 83 (*ante*, § 839), and hence the police officer's inference would be excluded even if the door could not be shown to the jury. Conversely, if the Court in such a case should rule that the police-officer could testify, it would be a ruling both that he was qualified under Rule 83 and that his inference was admissible under the present rule.

(2) In illustration (2) above, if the persons in the house were German and the police officer were asked to state in English what they said, and the Court ruled that he could so state, this would be a ruling that he was qualified under Rule 83, not a ruling under the present Rule.

ART. 2. *Rule applied to an Expert Witness.* If the subject
1413 of the testimony is one for which an expert witness would

[illegible]

10

der

the
state
re
d

sub
S Wc

be required under Rule 83 (*ante*, § 379), the same special experience which qualifies the witness is deemed also to supply, as a basis for inferences, some data which are not possessed by the jurors as persons of only ordinary experience; and therefore his inference is always admissible

(1) whether it is based in part on the condition of a *corporal object* which is or can be shown to the jury;

(2) or, whether it is based in part on data *observed by the witness himself* and capable of being adequately stated to the jurors;

(3) or, whether it is based in part on matters stated to the jurors in the *testimony of other witnesses*.

Illustrations. (1) In Illustration (1) of Art 1, if the desired inference is whether a cut on the door had been made by a chisel or by a gouge, and an expert carpenter were ruled to be necessary, the carpenter's inference would be permissible even though the door were before the jury in its original condition.

(2) So, also, in the same case, if the door were no longer to be had, and the witness had seen it shortly after the murder, his inference would be allowable even though he could adequately describe the position, shape, edges, length and depth of the cut.

(3) In the same case, if other witnesses who had seen the door had testified to the position, shape, edges, length, and depth of the cut, the carpenter's inference based on the data so testified to would be admissible.

1414 *Par. (a).* Insofar as a witness called to testify to a subject requiring expert qualifications under Rule 83 testifies *also to a subject not requiring* such qualifications, the rule of Art. 1 applies to that subject.

Illustration. If the carpenter, in the foregoing Illustration, should be asked whether a door so treated could have been broken down by a woman of ordinary strength, his inference would be excluded if the inference was one capable of being made from the appearance of the door, or from his description of it, by the jurors as persons of ordinary experience; and if not, the expert data could be supplied by a physician, but not by a carpenter.

1415 *Par. (b).* Insofar as a witness testifies as an expert to an inference, he need not state beforehand the data for his inference, as required for a lay witness under *Par. (a)* of

Art. 1, but may be required to state them on cross-examination, under Rule 86, Art. 2 (*ante*, § 402).

1416 ART. 3. *Hypothetical Statement of Data.* Insofar as a witness, qualified as an expert, testifies to inferences based in part or wholly on data supplied by the testimony of other witnesses (under Clause 3 of Art. 2 above), the testimonial validity of his inference, for use by the jurors, depends on whether the jurors find ultimately that the data on which it is based are correct; and therefore his answer, or the question of counsel to which the answer is given, must make substantially clear to the jurors

(1) the conditional or *hypothetical* nature of his inference; and

(2) the *specific data* upon which it is based. — (W. §§ 672, 673, 683.)

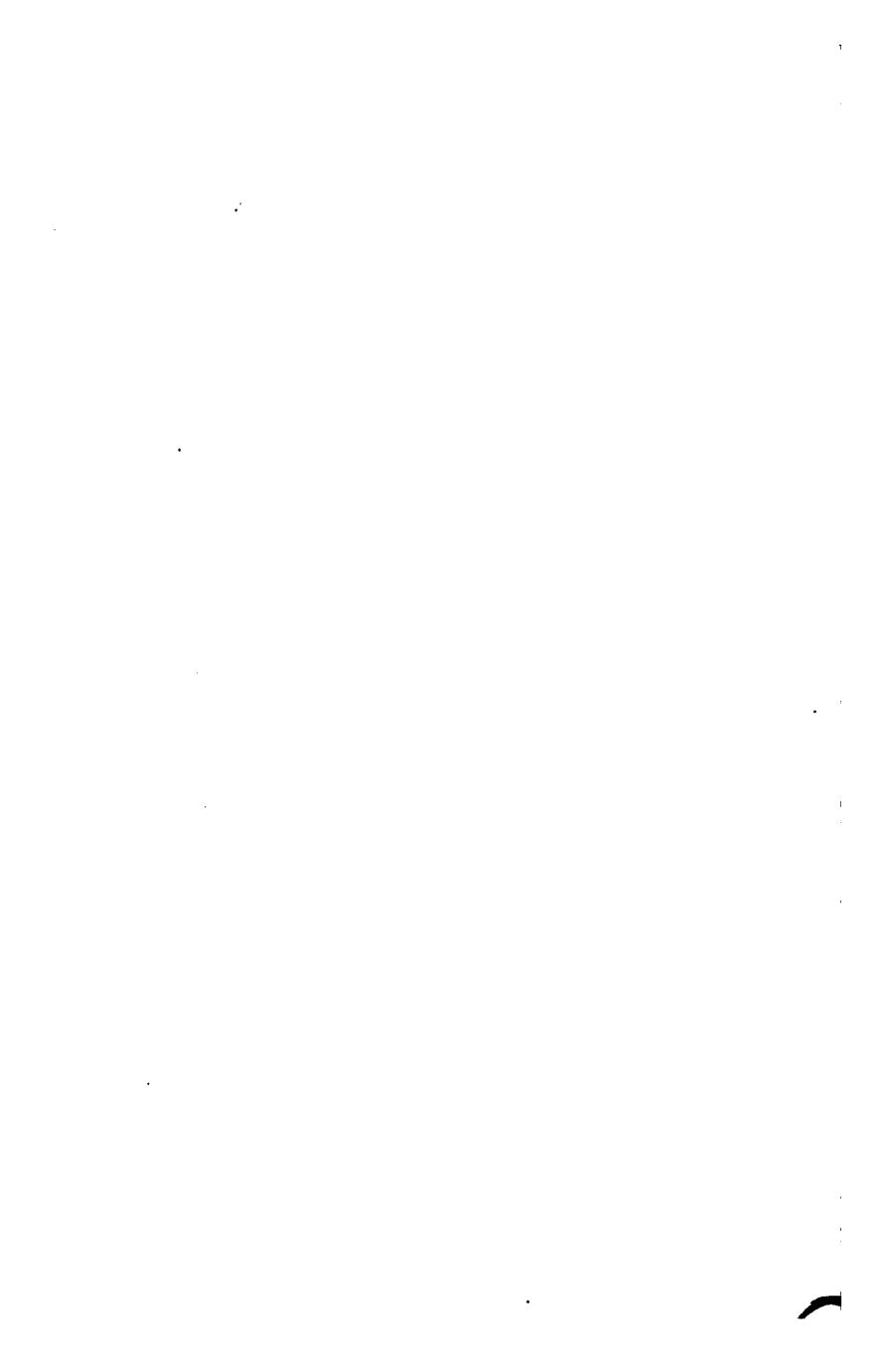
Illustrations. A medical expert to the insanity of a testator is desired to give an opinion on the significance of the testator's conduct. The expert had never seen the testator; but several friends of the testator have testified to his improvidence in business, his hallucinations, and violent brutality to his family; two others, however, contradict explicitly the brutal conduct in the instances specified. In obtaining the opinion of the expert, the answers must be made to depend on the correctness of the other testimony, and the specific supposed facts on which it rests must be made clear; so that when the jury pass upon the contradictory testimony they may be able to reject the expert opinion if it is based on the supposed conduct which they find not to have occurred.

1417 [Par. (a). The hypothetical specification of data by an expert witness is not necessary insofar as the data were *personally observed* by him];¹ — (W. §§ 675, 678.)

but the data are subject to be required on cross-examination, pursuant to the general principle of Rule 86, Art. 2 (*ante*, § 402).

1418 Par. (b). The hypothetical specification of data, for the purpose of obtaining an inference or opinion, may be used for *any subject of testimony* requiring an expert witness, and for any such witness. — (W. § 677.)

¹ Some Courts are *contra*, but not soundly.



1419 *Par. (c).* The hypothetical specification of data is not allowable for a subject of testimony *not requiring an expert witness*. — (W. § 679.)

1420 *Par. (d).* In specifying the data hypothetically, the specification must be so made that the *precise data* to which the witness' answer applies are, in the circumstances of the case, *substantially plain* to the jurors.¹ — (W. § 681.)

In particular, the following forms of question are *ordinarily not proper*:

[(1) "Upon all the testimony in the case."]²

[(2) "Upon what you have heard of the testimony in the case."]³

[(3) "Assuming the truth of the testimony for the plaintiff," or "for the defendant."]⁴

[(4) "Assuming the truth of the testimony of witnesses A, B, C, etc."]⁵

The following forms of question are *ordinarily proper*:

[(5) "Assuming the truth of the testimony of witness A."]⁶

1421 *Par. (e).* The data specified must be such that there is at least a fair possibility of the jurors finding them to be true. In general, it suffices if there is *some evidence tending to support the data specified*.⁷ — (W. § 682.)

1422 *Par. (f).* The data specified need not include *all the facts alleged* in the case of the party questioning. But the question must be inclusive enough not to be capable of misleading the jury by falsely appearing to apply the answer to the whole of a particular witness' testimony or the whole of a party's case. — (W. § 682.)

¹ Here the rule for trial Court's determination should be strictly enforced (Rule 18, *ante*, § 49).

² Many Courts allow this form where the testimony is not conflicting.

³ Sometimes this has been allowed.

⁴ Usually this is allowed.

⁵ This form is often allowed.

⁶ This form is often not allowed.

⁷ The phrasing differs in different Courts.



1423 *Par. (g).* The data specified must not be so lengthy or so confused as to tend to mislead the jury. — (W. § 682.)

1424 [[RULE 168 A. *General Principle.* An inference or opinion may always be stated in testimony to the jurors, provided the witness is qualified

(1) by personal observation, under Rule 86 (*ante*, § 400) of the data from which his inference is drawn,

(2) *and* by special experience, so far as it is required under Rule 83 (*ante*, § 379); and it is *immaterial*

(3) whether the data are capable of being so described by him in words or gestures that the jurors are equally capable of drawing an inference;

(4) or, whether the inference involves the very subject of an issue before the jurors;

(5) or, whether the data are stated by him before stating the inference;

provided that the trial Court may in any instance exclude testimony of inferences whenever under the circumstances it is

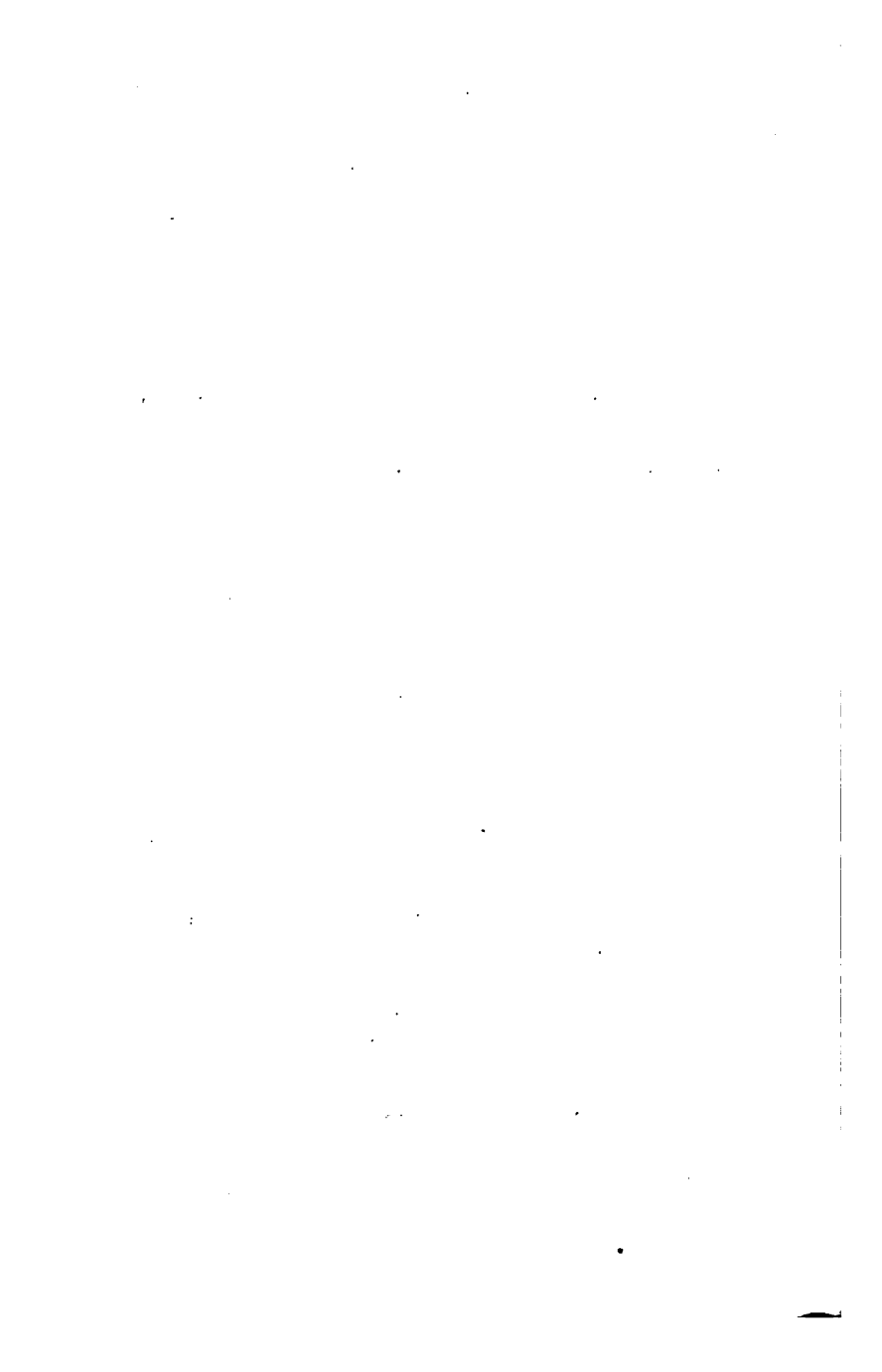
(6) merely cumulative and superfluous,

(7) or, tends unduly to influence the jurors by reason of the personality of the witness.]]¹ — (W. § 1929.)

1425 [[ART. 1. Wherever the inference is that of a witness qualified as an expert and is based in part or wholly upon data not personally observed by him but supplied in the testimony of another witness (etcetera as in Art. 3 of Rule 168 above).]]

(*Reason and Policy.* The Opinion rule as now enforced is anomalous in theory and vicious in policy. It is historically a mere blunder, the growth of the past century. It is devoid of any practical service whatever. The rare possibility of abuse for lack of it is easily checked by the judicial discretion above provided for. The rule is such a pernicious blight upon straightforward common-sense methods of getting at the truth that it ought to be rooted out. Every vestige should go. Nothing should remain as a handle for employing the old useless quibbles. If the memory of the rule could be assimilated to that of the fossil learning of *essoins* and common recoveries, the law of procedure would have nothing to regret and much to be thankful for.)

¹ This is nowhere law; but is proposed as the substitute of the future.



TOPIC B:

OPINION RULE APPLIED TO SPECIFIC TOPICS OF TESTIMONY

RULE 169. *Sanity or Insanity.* The principle of Rule 168
 1430 does not prevent a qualified witness, even though not an
 expert, from stating his inference or opinion as to the mental
 condition of a person with reference to sanity or other analo-
 gous fact material on an issue of capacity;
 subject to the following distinctions and modifications: ¹ —
 (W. §§ 1933-1938.)

ART. 1. *Knowledge.* The witness must be qualified by
 1431 his own personal observation of the person in question, under
 the general principles of Rule 86 (*ante*, § 400) and Rule 87,
 Art. 1 (*ante*, § 416.)

[**ART. 2. *Prior Specification of Data.*** The witness must
 1432 first specify the data of conduct observed by him in the
 person in question, pursuant to the general principle of Rule
 168, Art. 1, Par. a (*ante*, § 1412).] ²

ART. 3. *Attesting Witness.* An attesting-witness to a will
 1433 may state his opinion without regard to the two foregoing
 requirements. ³

[**ART. 4. *Opinion limited to Specific Acts.*** The witness'
 1434 opinion must not relate to the person's general mental con-
 dition, but must be limited to

(1) The quality of the specific conduct observed. ⁴

(2) The quality of the specific acts observed, in respect
 to the impression produced as to them on the witness. ⁵

Distinctions. An opinion as to *mental capacity* in general
 may run counter to the opinion rule in another aspect, as
 forbidding an inference of law, under Rule 173, Art. 4 (*post*,
 § 1454).

¹ None of these Rules 169-176 are needed if Rule 168 A
 (*ante*, § 1424) be adopted.

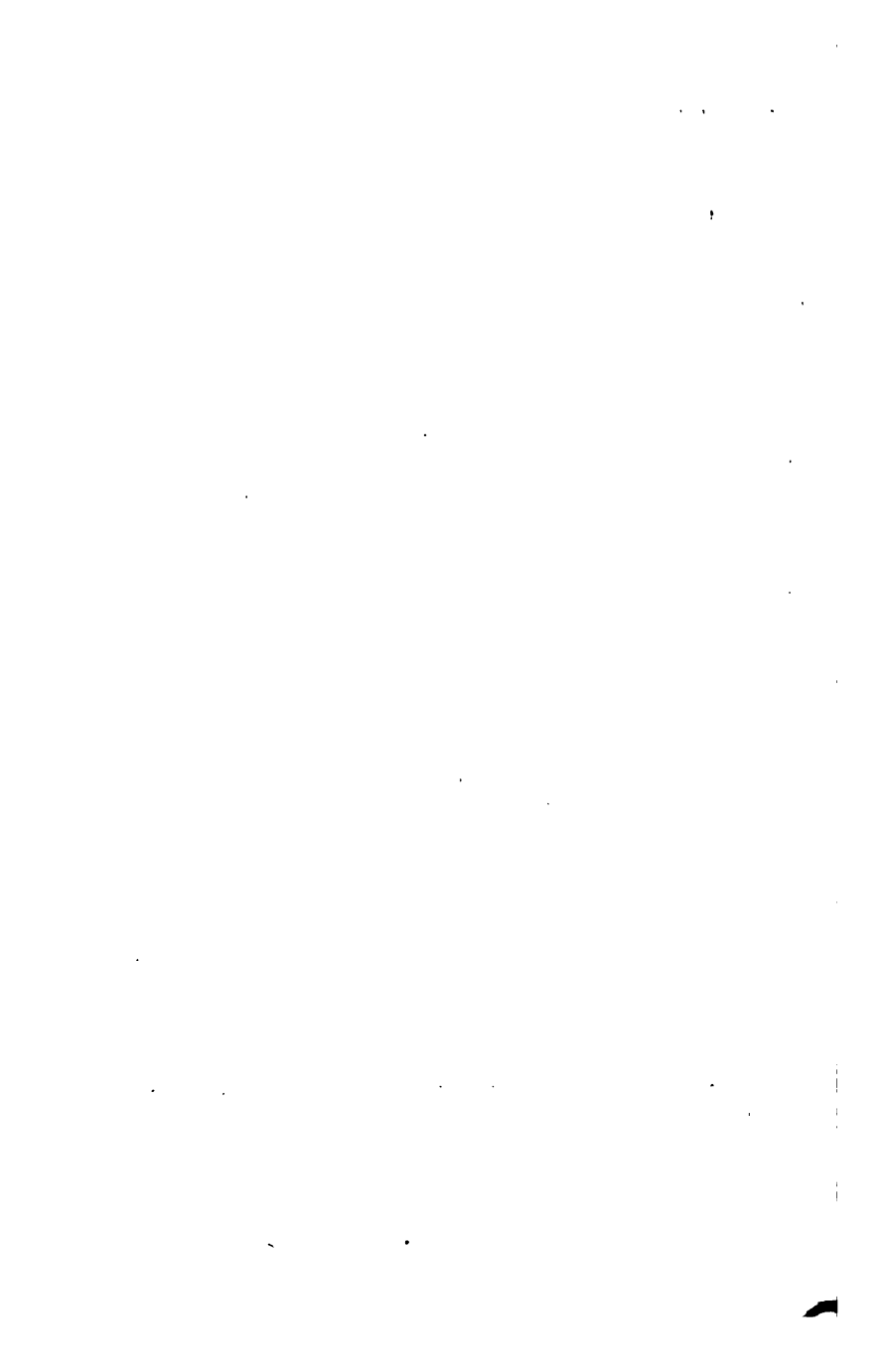
² A majority of Courts require this, but unsoundly.

³ This is a mere historical relic, and is unsound.

⁴ This is an attempt to state the New York quibble.

⁵ This is an attempt to state the Massachusetts quibble.

— There may be a few other local forms of quibble.



Cross-reference. For the application of the opinion rule to other topics of *medicine and health*, see Rule 175, Art. 2 (*post*, § 1472).

RULE 170. *Value.* The principle of Rule 168 does not
1435 prevent a qualified witness from stating his inference or
opinion as to the value of property or services;
subject to the following distinctions and modifications: —
(W. §§ 1940-1944.)

[ART. 1. *Land.* Where the issue involves the total loss or
1436 increase of value caused by the taking of a piece of land
under eminent domain, the witness may state only the value
before taking and the value after taking.]¹

[ART. 2. *Personalty.* Where the issue involves the amount
1437 of damage to personalty, the witness may state only the
value before the injurious act and the value afterwards.]²

[ART. 3. *Services, Tort-Damage, Contractual Non-Perform-*
1438 *ance.* Wherever the issue involves the amount of damage
caused by a tort or a breach of contract, the witness may
state only abstract value of the services, goods, or other thing
involved, and may not state the value of the actual loss or
damage in the specific case.]³

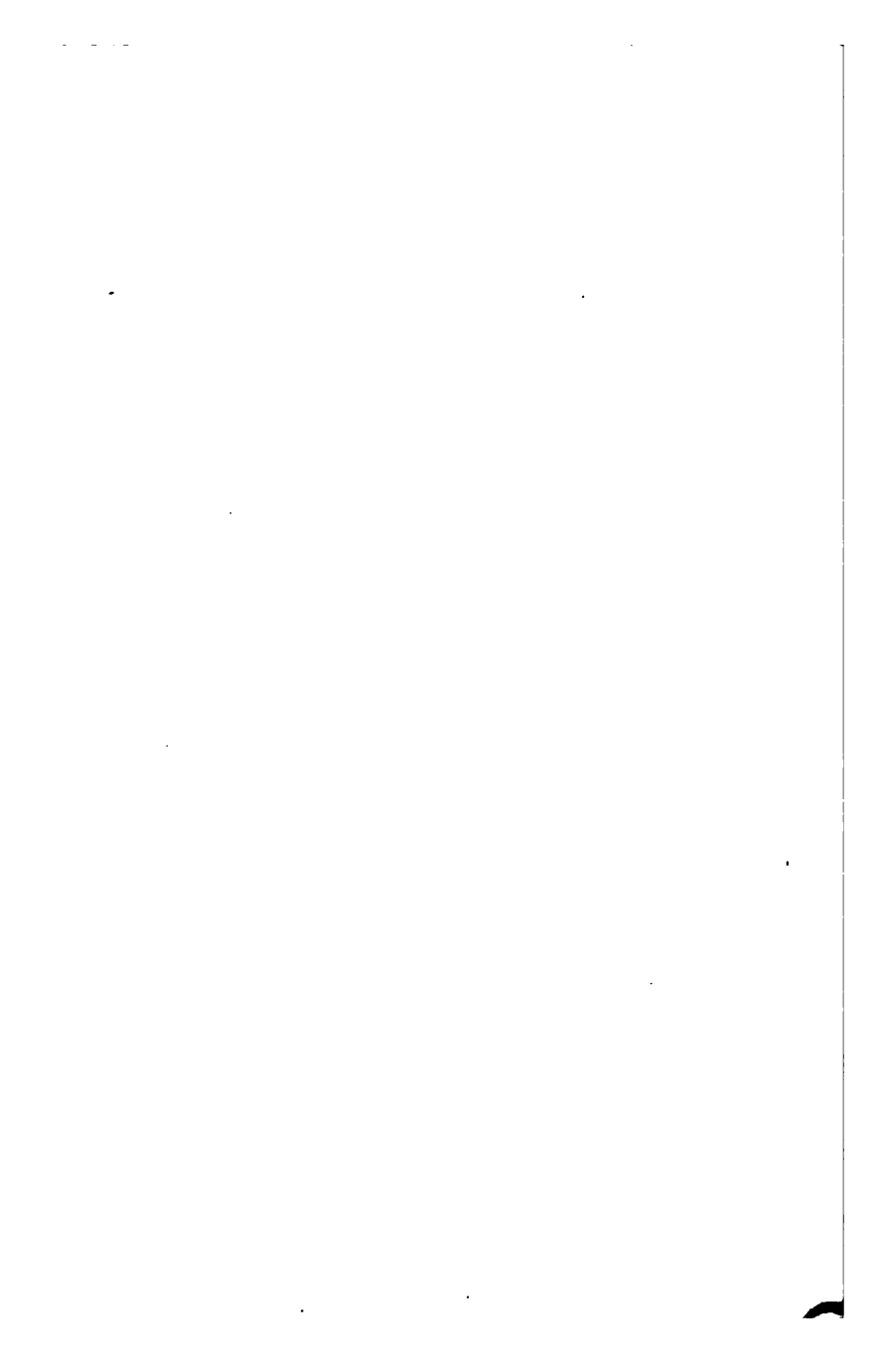
RULE 171. *Insurance Risk.* When in an action on a contract
1440 of insurance the issue is whether a particular circumstance
was "material to the risk" or caused an "increase of risk,"
testimony by expert opinion is not excluded under the
general principle of Rule 168 (*ante*, § 1410);
subject to the following distinctions and modifications: —
(W. §§ 1946, 1957.)

[ART. 1. *Actual Risk.* If under the contract the term
1441 "risk" signifies the actual risk of loss by fire, the testimony

¹ Some Courts draw this distinction, but unsoundly. There are also other occasional local quibbles.

² Some Courts sanction this quibble.

³ There is in many Courts some such quibble, difficult to define, because not rational.



of expert witnesses thereto is receivable or not, according to the circumstances of the case, pursuant to the general principle of Rule 168, Art. 2 (*ante*, § 1413).]¹

1442 [ART. 2. *Classified Risk*. If under the contract the term "risk" signifies the classified schedule of risks adopted by insurers in general or by the contracting insurer in particular, the testimony of expert witnesses is receivable as to the risks as thus classified by the trade or by the particular insurer, but not as to the actual risk of the particular circumstance.]²

1443 [ART. 3. *Known Risk*. If under the contract the term "risk" signifies the risk as known to the insured, the testimony of expert witnesses is not receivable, except so far as under the circumstances it is admissible under the general principle of Rule 168 (*ante*, § 1410) to show the insured's probable knowledge of the risk.]³

1445 RULE 172. *Quality of a Thing or of Human Conduct as to Reasonableness, Care, Duty, Safety, and the Like*. The principle of Rule 168 (*ante*, § 1410) does [not] prevent a qualified witness from stating his inference or opinion as to the quality of a thing or of human conduct as to reasonableness, care, duty, safety, necessity, sufficiency, propriety, or the like, or their opposites.⁴ — (W. §§ 1949-1951.)

Distinctions. (1) The fact of *other persons' conduct* may be relevant to evidence the reasonableness, care, or the like, of the person in issue, under Rule 73, Art. 5 (*ante*, § 354).

(2) The application of the opinion rule to *moral character*, *negligent character*, and *professional skill* is covered by Rule 170 (*post*, § 1478).

¹ Most Courts take this view; but its construction of the contract is usually not correct.

² A minority of Courts use this rule, which will commonly be the correct construction.

³ Once in a while a Court takes this view, which is often the correct construction.

⁴ A few Courts recognize the negative form of this rule. But the great majority, in one aspect or another, exclude such testimony. The opinion rule here appears in its most senseless and unpractical aspect.

..

.

.

.

.

.

.

.

.

.

.

.

.

.

RULE 173. *Law.* The principle of Rule 168 (*ante*, § 1410) excludes a witness' statement of his opinion or inference on a matter of law; with the following distinctions and modifications:— (W. § 1952.)

ART. 1. *Foreign Law.* A witness qualified as an expert witness under Rule 83, Art. 4 (*ante*, § 382) may state his inference or opinion as to a rule of law in a foreign jurisdiction.— (W. § 1953.)

1448 *Par. (a).* A State or Territory or Dependency of the United States is not a foreign jurisdiction, except insofar as a system other than the Anglo-American common law forms a substantial part of its law.¹

1449 *Par. (b).* The opinion may be stated even though the text of a statute is involved and is duly evidenced to the tribunal.

Cross-references. (1) Whether the *text of a statute must be* evidenced is governed by Rule 128, Art. 6 (*ante*, § 826).

(2) Whether the determination of the foreign law is for the judge or for the jury is governed by Rule 229 (*post*, § 2115).

1450 ART. 2. *Trade Usage.* A witness to trade usage may not state his inference as to the legal right or liability produced thereby.— (W. § 1954.)

1451 ART. 3. *Interpretation of Documents.* A qualified witness to the application of a document may state as follows:— (W. § 1955.)

Par. (a). He may state the *technical meaning* of words or phrases said to be governed by a special usage.

Distinctions. (a) Whether the *judge* or the *jury* is to determine the meaning depends on Rule 229 (*post*, § 2110).

(b) Whether the *parol evidence* rule permits interpretation by special usage at all depends on Rule 222, Art. 2 (*post*, § 1962).

1452 [*Par. (b).* He may state the application of descriptive words and phrases, whether or not they have a technical

¹ This point seems not to have been decided.

§§ 1453-1458 OPINION RULE: MENTAL STATE

meaning, to specific actual places, so far as he is acquainted with those places.]¹ — (W. § 1956.)

1453 *Par. (c).* He may state the effect or substance of the contents of a lost document, so far as Rule 184, Art. 2 (*post*, § 1565), requiring completeness, does not prevent. — (W. § 1957.)

1454 ART. 4. *Accused's or Testator's Capacity.* A qualified witness to the mental powers of an accused or a testator may state his inference or opinion, provided it does not involve stating a legal definition or conclusion.² — (W. § 1958.)

1455 ART. 5. *Sundries.* A qualified witness to the fact of solvency, possession, title, or the like, may state his inference or opinion, provided it does not involve stating a legal definition or conclusion.³ — (W. §§ 1959, 1960.)

1457 RULE 174. *State of Mind (Intention, Feelings, Knowledge, Meaning, Understanding, etc.).* The principle of Rule 168 (*ante*, § 1410) does not prevent a qualified witness from stating his inference or opinion as to another person's state of mind, in particular, as to the person's intention, feelings, knowledge, meaning, understanding, or the like;

with the following distinctions and modifications: — (W. § 1962.)

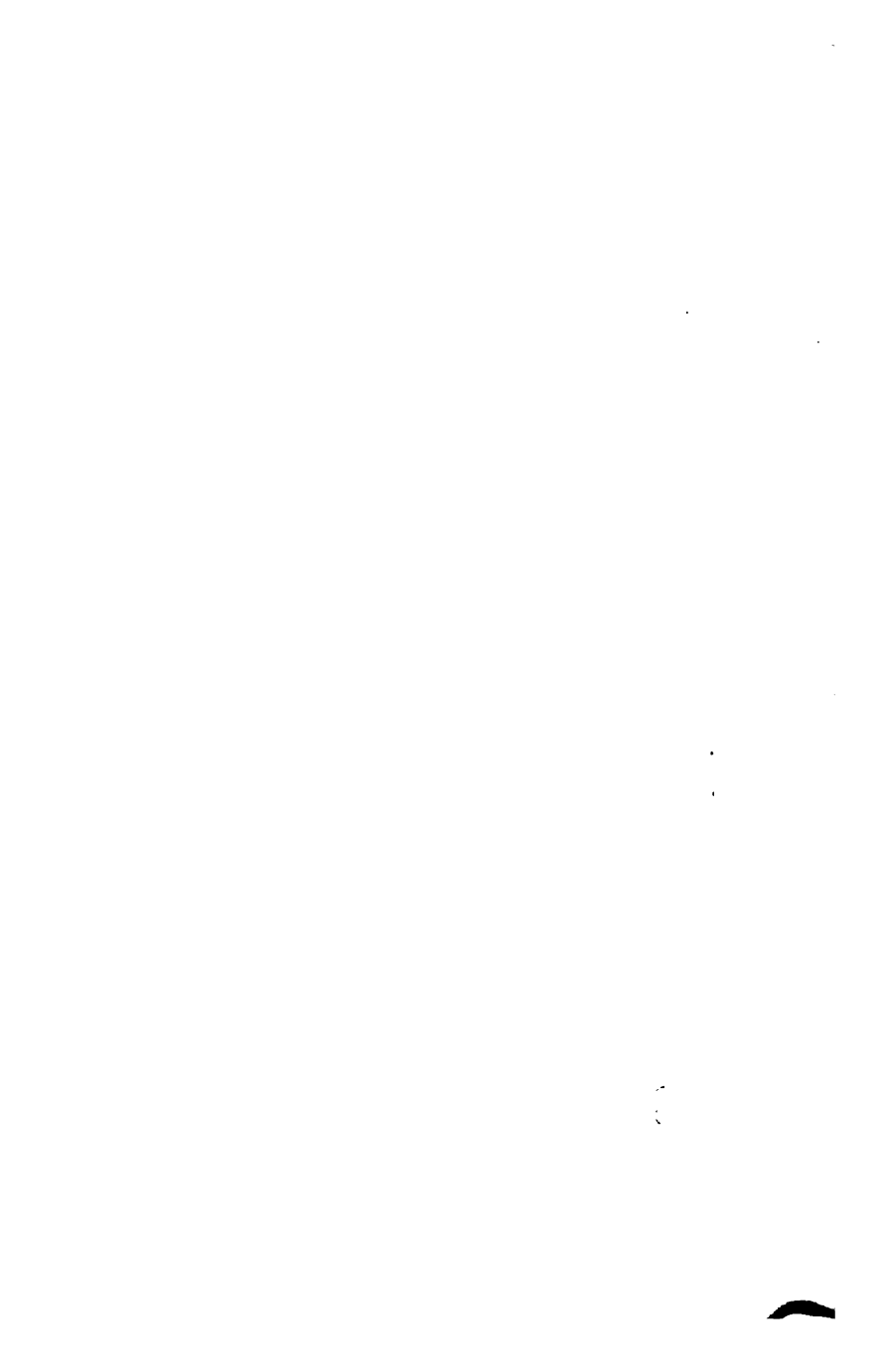
1458 ART. 1. *State of Mind in general.* A qualified witness may [not] state his inference or opinion as to another person's intention, feeling, knowledge, or sensation, as based upon an observation of the person and his conduct and the surrounding circumstances, [but may state merely the observed data from which the inference may be drawn.]⁴ — (W. §§ 1963, 1966.)

¹ A few Courts do not concede this, but unsoundly.

² There is much quibbling here.

³ This produces merely useless quibbles.

⁴ Many Courts adopt the form of the rule in brackets. — The Court of Alabama has a bizarre set of rules peculiar to itself.



Distinctions. (a) A few Courts exclude such testimony on the ground of lack of *knowledge*, under Rule 86, Art. 5 (*ante*, § 405).

(b) An objection to such testimony as to *one's own intent*, under Rule 84, Art. 3 (*ante*, § 392) has been generally repudiated.

(c) The intent of another person or of oneself may be immaterial under the substantive law of *defamation*, *dedication*, *crime*, or the like, and thus the testimony may be inadmissible without regard to the present rule.

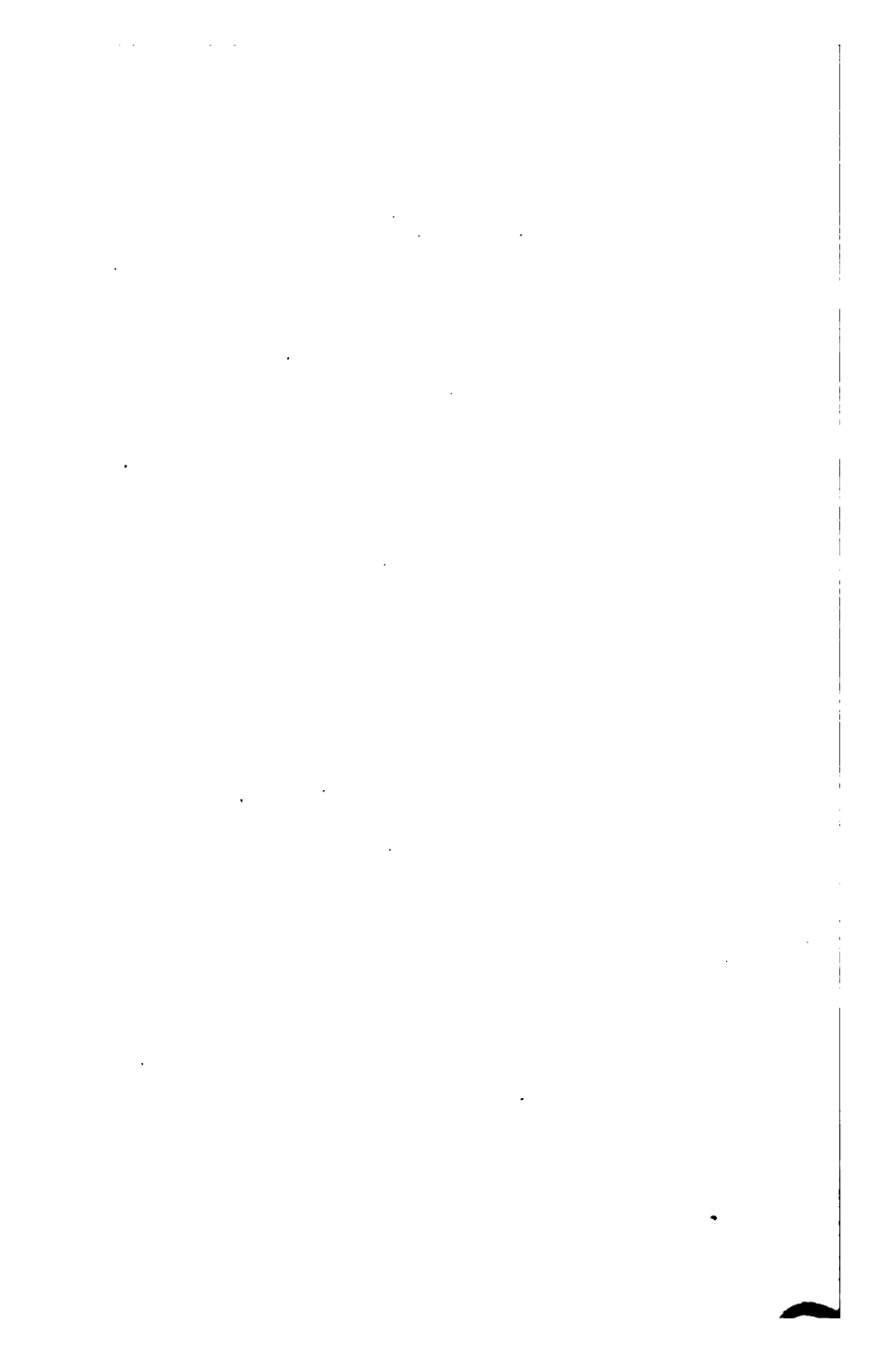
(d) In the same way, a person's *intent* may be immaterial under some branch of the parol evidence rule, particularly under Rule 214, Art. 5 (*post*, § 1895) or Rule 222, Art. 4 (*post*, § 1970).

(e) Whether a person's intent may be evidenced by *his own statements* of intent involves the hearsay rule, either under the exception for mental condition (Rule 153, Art. 2, *ante*, § 1207, Art. 4, *ante*, § 1218), or under the verbal act doctrine (Rule 155, Art. 2, *ante*, § 1245).

Illustrations. (1) Prosecution for assault with a deadly weapon. A bystander's opinion as to the accused's intent to kill the assaulted person would be inadmissible because the intent to kill is immaterial under the charge. But on a charge of assault with intent to kill, the bystander's opinion would be admissible, under Art. 1 above, by one view, and inadmissible, by the other.

(2) In a proceeding to probate a will, the document containing an alteration substituting the name of John for James, and the issue being whether the alteration was made before or after execution, the testator's declarations of intent after execution are not admissible either to evidence the execution under Rule 153, Art. 4 (*ante*, § 1218) or to interpret the document under Rule 223, Art. 1 (*post*, § 1976); but his intention and his declarations of intentions before executing are evidential under Rule 37, Art. 4 (*ante*, § 184) and Rule 153, Art. 4 (*ante*, § 1218), and an observer's opinion of the ante-testamentary intention ought to be admissible under the present Rule.

ART. 2. *Meaning of an Utterance.* Where the meaning of
1459 an utterance depends in part on the conduct of the person uttering, or on circumstances special to those who heard or read it, or on technical usage, a qualified witness may [not] state his inference or opinion of the intended meaning of another person's utterance, or the impression or effect produced as to that meaning, whether in a conversation or any other



form of utterance, [but may state merely the specific words and conduct as observed].¹ — (W. §§ 1969-1972.)

Distinctions. (1) A witness' "impression" or "belief" may be excluded because it is not based on personal observation, under Rule 86, Arts. 3, 5 (*ante*, §§ 401, 405).

(2) A witness' opinion as to another person's meaning may be excluded because the person's individual meaning may be *immaterial* under the substantive law, *e. g.* of contract or of defamation.

(3) In the same way, the other person's meaning may be *immaterial* under the *parol evidence* rule (Rule 214, Art. 5, *post*, § 1895; Rule 222, Art. 4 *post*, § 1970).

Illustrations. In an action for defamation in calling the plaintiff a "frozen snake," the defendant's individual meaning is immaterial, by the law of defamation. The individual meaning accepted by a specific reader might also be immaterial. The opinion of an ordinary witness as to the ordinary meaning would usually be excluded, because the jurors have equal means of interpreting it. But where the conduct of the utterer, or the circumstance attending the utterance, may affect the meaning, one who has observed them might testify, by the liberal form of the rule. Where technical usage is involved, an expert witness to the usage might in any case state the meaning, as also provided by Rule 173, Art. 3 (*ante*, § 1451).

RULE 175. *Sundry Topics.* The principle of Rule 168 1461 (*ante*, § 1410) does not prevent a qualified witness from stating his inference or opinion as follows:

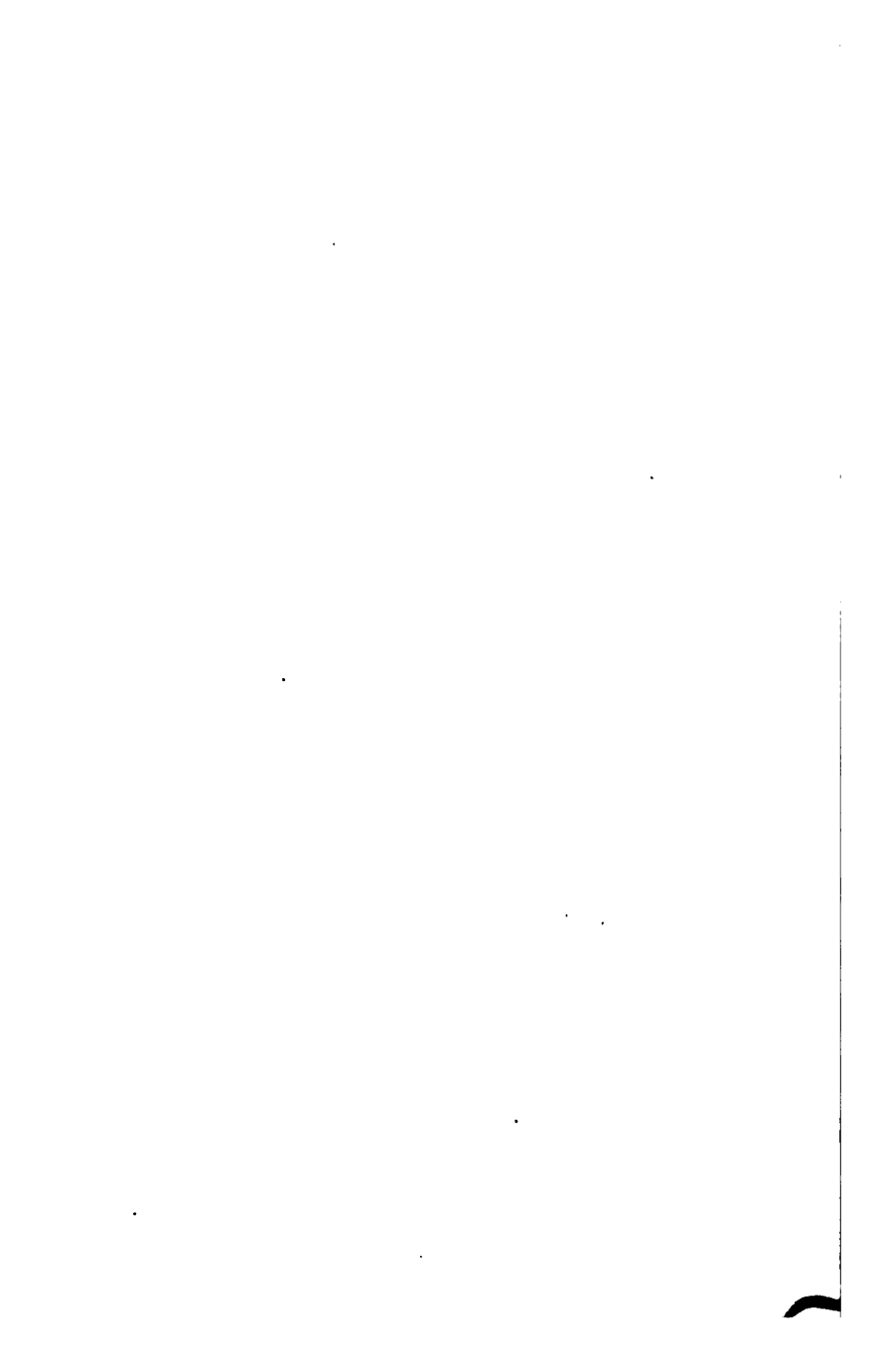
ART. 1. *Corporal Appearance of Things and Persons.* He may state his inference or opinion as to the corporal appearance of a thing or person with reference to any quality or condition therein exhibited.² — (W. § 1974.)

Illustrations. Whether a person looked sad, shouted in distress, seemed afraid or envious, appeared lame or intoxicated, etc.

ART. 2. *Medical, Surgical, and Pathological Appearances.* 1462 He may state his inference or opinion as to an appearance of

¹ A majority of Courts apply the bracketed form of the rule; but this is unsound, even by a strict application of the opinion rule.

² Here are found a mass of quibbles.



health, disease, injury, or any other medical, surgical, or pathological matter. — (W. § 1975.)

Cross-reference. For the line between *lay* and *expert* qualifications in such matters see Rule 83, Art. 4 (*ante*, § 382).

ART. 3. *Probability and Possibility, Cause and Effect, Capacity and Tendency.* He may state his inference or opinion as to the probability or possibility of a thing occurring or being done, the cause or effect of an act or an occurrence, the capacity or tendency of a thing or a person to do or to become.¹ — (W. § 1976.)

Illustrations. Whether a train could be stopped; what caused a wound; the probable life of timber; the effect of an increase of speed; etc.

ART. 4. *Distance, Time, Speed, Size, Weight, Direction, Form, Identity, etc.* He may state his inference or opinion as to distance, time, speed, size, weight, direction, form, identity, and the like.² — (W. § 1977.)

RULE 176. *Moral Character and Professional Skill.* The principle of Rule 168 (*ante*, § 1410) prevents a qualified witness from stating his inference or opinion as to the qualities of another person in respect to moral character or professional skill;

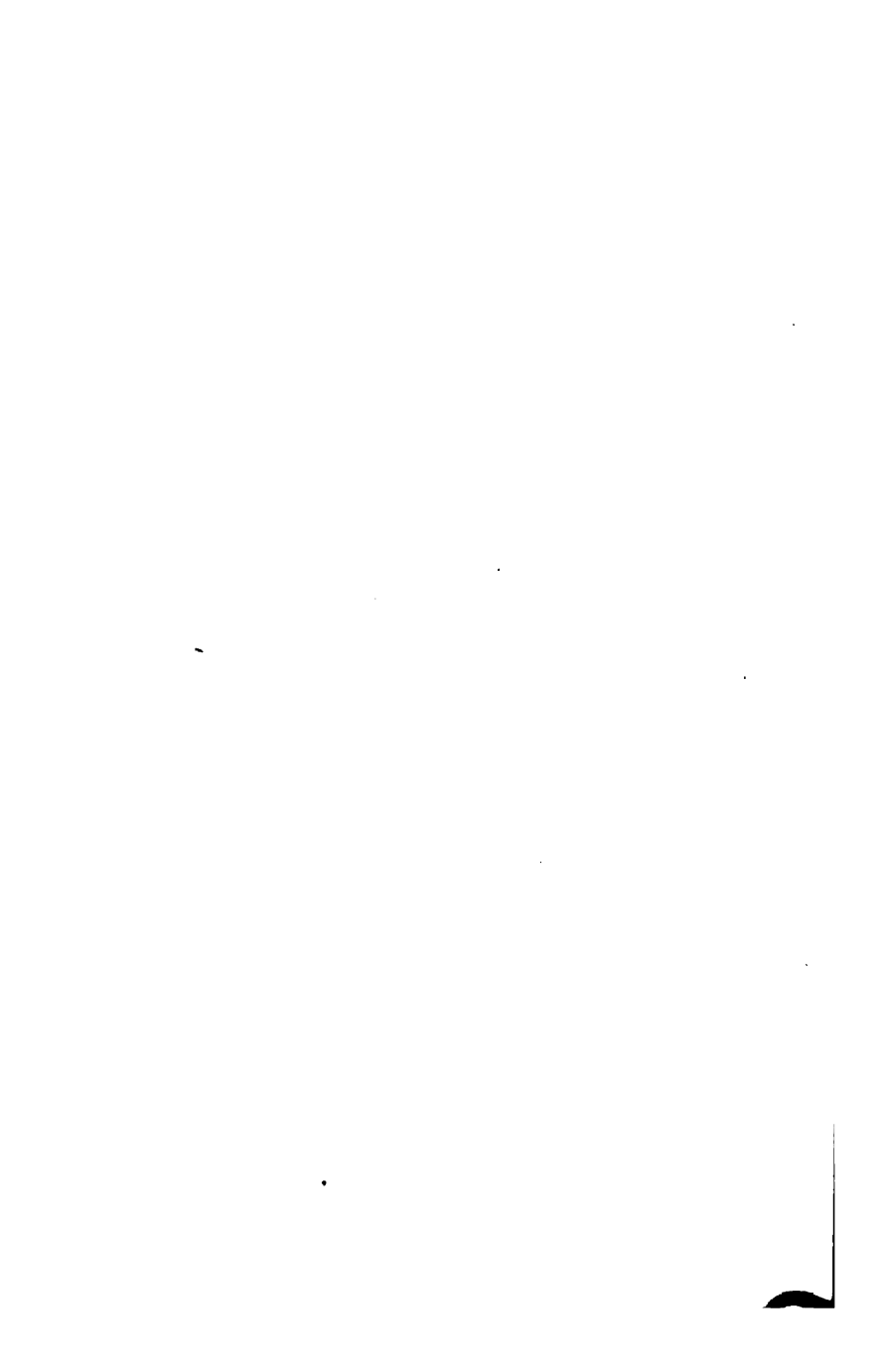
subject to the following distinctions and modifications: — (W. §§ 1983-1985.)

Cross-reference. For *reputation* as a mode of evidencing, see Rule 147, Art 4 (*ante*, § 1071).

ART. 1. *Moral Character (Accused, Deceased, Rape, Complainant, etc.).* The moral character of a person, when relevant or material, whether that of an accused in a criminal case, a complainant in a rape charge, a deceased in a homicide charge, or any other person, may [not] be evidenced by the

¹ Here countless barren quibbles defy exact statement of the actual law.

² Very few Courts push the opinion rule so far as to exclude any of this kind of testimony.



inference or opinion of a witness qualified by personal observation under Rule 86 (*ante*, § 800).¹ — (W. § 1983.)

Cross-reference. For *particular acts* as evidence, see Rules 43-49 (*ante*, §§ 218-239).

1470 ART. 2. *Character for Care, Competence, or Skill.* The character of a person, for care, competence, or skill, when relevant or material, whether a party or a third person, may [not] be evidenced by the inference or opinion of a witness qualified by personal observation under Rule 86 (*ante*, § 800) and by special experience when required under Rule 83 (*ante*, § 379).² — (W. § 1984.)

Cross-references. For *particular acts* as evidence, see Rule 46 (*ante*, § 228), Rule 49, Arts. 6, 7 (*ante*, §§ 237, 238).

1471 ART. 3. *Character of a Witness.* The testimonial character of a witness, whether in general or only for the particular trait of veracity, as relevant under Rule 98, Art. 1 (*ante*, § 519) or Rule 110 (*ante*, § 596), may not be evidenced by the inference or opinion of a witness qualified by personal observation under Rule 86 (*ante*, § 800);³ — (W. § 1985.)

[*provided* that a person who is acquainted with the witness' reputation as to veracity [or general character]⁴ may state whether, from that knowledge of the reputation, he would believe the witness on oath.]

Cross-reference. For the methods of *discrediting the impeaching witness*, see Rule 111, Art. 1 (*ante*, § 604).

1475 RULE 177. *Handwriting.* Wherever the authorship of a piece of handwriting is to be evidenced from the type or trait of handwriting belonging to a particular person, under Rule 36 (*ante*, § 170) and Rule 66, Art. 5 (*ante*, § 321), a witness who is qualified by a knowledge of genuine specimens

¹ A senseless rule, in the negative form; but only two or three Courts give any recognition to the affirmative form.

² A majority of Courts properly accept the affirmative form of this rule.

³ All Courts go this far; then most accept the proviso. The rule is senseless.

⁴ According as this is or is not admissible under Rule 98, Art. 1 (*ante*, § 519).



of the person's type of handwriting, whether or not he has special experience in handwriting, may state his inference or opinion that the writing in issue is or is not that of the person whose handwriting-type is known to him;

subject to the following distinctions and modifications:

1476 ART. 1. *Lay Witness having Personal Knowledge.* A witness who has obtained his knowledge of the type of handwriting by observation of specimens known to him as genuine in one of the methods recognized as sufficient under Rule 87, Art. 3 (*ante*, § 418), that is, by having seen the person write or by having exchanged correspondence or been the custodian of documents or otherwise, may state his inference or opinion, without further conditions.¹

1477 [Par. (a). If the witness is the *custodian of ancient documents*, he may bring the specimen documents into court and compare them with the writing in issue, even though he has no special experience in handwriting.]² — (W. § 2006.)

1478 Par. (b). If the witness desires to *refresh his memory* as to the type, he may bring into court the specimens which formed the basis of his opinion, and peruse and compare for that purpose. — (W. § 2007.)

1479 ART. 2. *Lay Witness not having Personal Knowledge.* A witness who has not obtained a knowledge of the type of handwriting by observation of specimens known to him as genuine by one of the methods recognized as sufficient under Rule 87, Art. 3 (*ante*, § 418), and who has no special experience in handwriting, may not state his inference or opinion. — (W. § 2004.)

1480 ART. 3. *Expert Witness.* A witness who has obtained no knowledge of the type of handwriting by observation of specimens known to him to be genuine as provided in Art. 1, but has a special experience in handwriting, may [not] state

¹ This is simply the corollary of Rule 87, when the opinion rule is invoked.

² This is perhaps still the law, though it is anomalous.



his inference or opinion on the following conditions: ¹ — (W. § 2008.)

1481 *Par. (a).* His experience, either in scientific study or in professional occupation, must have given him a *special skill* in the identification of handwriting. — (W. § 2012.)

1482 *Par. (b).* He must have *inspected specimens* purporting to be those of the person to whose type of handwriting he is to testify;

(1) *and* the inspection may have been made *out of court*;

(2) *but* the specimens must, on demand of the opponent or on order of the judge, be *produced* in court. — (W. § 2011.)

1483 *Par. (c).* The specimens inspected by him *must have been evidenced as to their genuineness* in some manner that does not violate the principles of avoiding excessive confusion of issues (Rule 165, *ante*, § 1383) or unfair surprise to the opponent (Rule 161, *ante*, § 1326); that is to say, they must be

² [(1) Specimens which have been determined to be genuine *by the judge*, on evidence offered to him;] — (W. §§ 2013, 2020.)

³ [(2) or, Specimens conceded by the *opponent's admission* to be genuine;] — (W. §§ 2013, 2021.)

⁴ [(3) or, Specimens furnished by *documents otherwise material or relevant* in the case and therefore admissible, on evidence of genuineness, independently of the present purpose;]

¹ A few Courts still exclude expert opinion entirely, as at common law in England. Most Courts admit it on one of the following conditions.

² This is the only sound method; by common law or by statute it obtains in a few States. Nevertheless, it need not be exclusive of the other methods.

³ This is the rule in some States.

⁴ This is the rule in some States. A majority of States accept both Clause (2) and Clause (3). A few States impose the quite erroneous limitation that the document must satisfy *both* Clause (2) and Clause (3.)



1484 *Par. (d).* The specimens must not have been so selected as to be *unfair indications of the person's type of handwriting*, by reason either of their number, kind, or time of making; [[and for this purpose the judge may require them to be submitted to the opponent's inspection at a suitable time and place]].¹ — (W. §§ 2009, 2018.)

1485 *Par. (e).* The specimens may be *photographic* or other facsimile *copies*, provided their originals are unavailable for production under the principle of Rule 126, Art. 3 (*ante*, § 754).² — (W. §§ 797, 2010, 2019.)

1486 *Par. (f).* In any case the witness may by *photographic enlargement*, or otherwise, pursuant to the principle of Rule 93, Art. 2 (*ante*, § 480), exhibit to the jurors the details of the specimens so as to explain his opinion. — (W. §§ 797, 2019.)

1487 ART. 4. *Testing the Witness on Cross-Examination.* [Any witness may be *tested on cross-examination*, pursuant to the principles of Rule 106 (*ante*, § 558), Rule 107, Art. 2 (*ante*, § 572), and Rule 108, Art. 2 (*ante*, § 578), by specimens selected by the counsel and shown to the witness, with or without evidence of their genuineness, subject to the trial Court's limitation of unfair or unreasonable methods.]³ — (W. § 2015.)

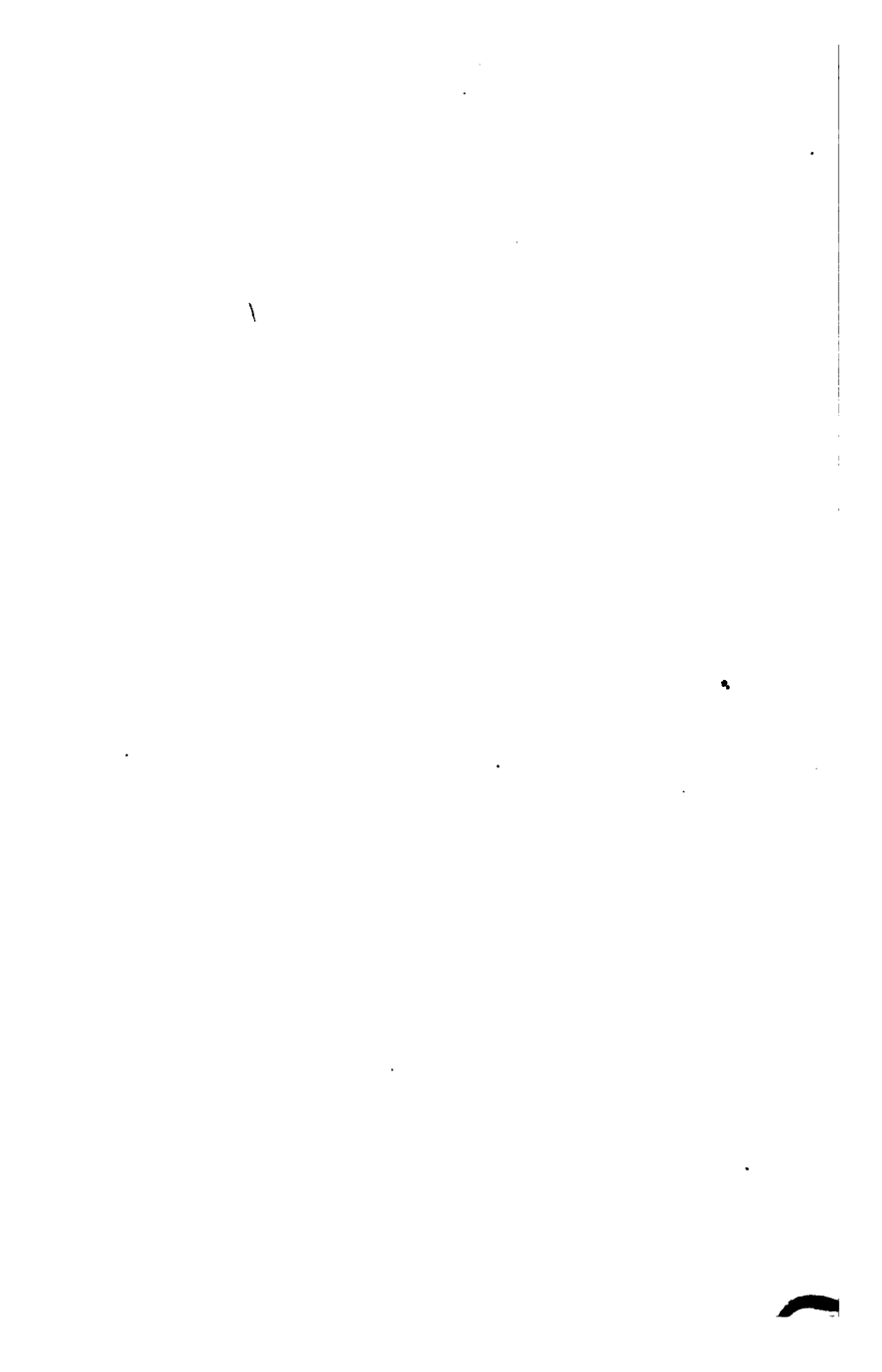
Illustrations. (1) Several witnesses for the prosecution unite in identifying a signature as the accused's. Counsel then shows to each another signature, and upon this they disagree radically. Irrespective of the genuineness of the second signature, their harmony of opinion as to the former signature is thus discredited.

(2) A witness denies the authenticity of a signature to a note sued upon. He is then shown another signature, which he affirms to be genuine. A person who saw the second signa-

¹ This general principle is everywhere law; but the numerous rulings as to specimens made *post litem motam*, etc., are matters entirely for the trial Court's determination, not for any specific rule. The double-bracketed clause is not law, but should be.

² No more detailed rule than this is desirable.

³ Here the Courts vary much in their rulings. Good sense requires a liberal untrammelled rule as above.



ture written then testifies to its genuineness. Thus the first witness' credit is shaken.

1488 ART. 5. *Exhibiting Specimens to the Jury.* Wherever the authorship of a piece of handwriting is to be evidenced from the type or trait of handwriting belonging to a particular person, under Rule 36 (*ante*, § 170), it may be evidenced, pursuant to the principle of Rule 66, Art. 5 (*ante*, § 170), by specimens of the handwriting of the person, on the following conditions: — (W. § 2016.)

1489 Par. (a). The specimens must fulfil the conditions of Art. 3, Par. (c), (d), and (e), above, as to genuineness, selection, and copies.

1490 Par. (b). The specimens may be handed to the jury for inspection; [but may not be shown by photographic enlargement or otherwise artificially, except in connection with an expert witness' testimony under Art. 3, Par. (f), above].¹

1491 ART. 6. *Expert Testimony to Ink, Spelling, Imitations,* etc. Wherever the authorship of a piece of handwriting, or any other fact material or relevant to authorship or to handwriting, is to be evidenced by some circumstance concerning ink, spelling, paper, type, illegibility, imitation, erasure, alteration, or the like, the circumstance may be evidenced

(1) by an expert witness,

(2) or, by specimens,

subject to the applicable limitations of Arts. 1 to 5 above.²

— (W. §§ 2023-2027.)

¹ The bracketed clause may not be law.

² There are some erratic rulings in this field. Detailed rules are futile. A general section like this suffices; the determination of the trial Court should control in its application, under Rule 18 (*ante*, § 49).



TITLE V: QUANTITATIVE (OR, SYNTHETIC) RULES

SUB-TITLE I. NUMBER OF WITNESSES REQUIRED

RULE 178. *General Principle.* Subject to the exceptions 1500 prescribed in Rules 179 and 180 (*post*, §§ 1500, 1516) no specific number or kind of witnesses is required for evidencing any material or relevant fact; and the testimony of a single qualified witness to such fact may therefore suffice to be admitted and to go to the jury without any additional testimonial or circumstantial evidence. — (W. §§ 2033, 2034.)

(*Reason and Policy.* Though there are occasional dangers in trusting to a single witness, yet the mere number does not necessarily remove the dangers, inasmuch as the credibility of a witness is a quality varying infinitely, being irrespective of numbers, and the testimonial value is always likely to be sufficiently exposed by cross-examination and the other methods of impeachment. Moreover, rules of number introduce new dangers of collusion and new obstructions to honest cases, and tend to mislead the jurors into numbering instead of weighing the testimony.)

Cross-references. (1) For the rule that the testimony of a single witness does not *need to be believed*, even though no impeaching evidence has been introduced, see Rule 5, Arts. 3 and 4 (*ante*, §§ 14, 15).

(2) For the rule that the judge may refuse to submit to the jury the case of any party who has introduced *sufficient evidence* on the whole issues or any particular issue, see Rule 226 (*post*, § 2002).

RULE 179. *Rules of Number for Specific Issues.* In the 1502 specific issues here enumerated, one witness is not sufficient:

ART. 1. *Treason.* On a charge of treason, there must be 1503 two witnesses testifying credibly to the same overt act; *unless* the accused confesses in open court. — (W. §§ 2037-2039.)

§§ 1504-1508 REQUIRED NUMBER OF WITNESSES

ART. 2. *Perjury*. On a charge of perjury, there must be
1504 (1) either a second witness to the falsity alleged,
(2) or, corroboration of a single witness by some other
form of evidence. — (W. §§ 2041-2043.)

Par. (a). This rule does not apply where the falsity
1505 can be inferred from a contradictory statement made by
the accused [under oath].¹ — (W. § 2043.)

ART. 3. *Sundry Crimes*. On a charge of [enticement for
1506 prostitution] [violation of election-laws] [false pretences] [a
capital crime], there must be

(1) either a second witness to a material part of the
criminal act,

(2) or, corroboration of a single witness by some other
form of evidence.² — (W. § 2044.)

[ART. 4. *Chancery Bill*. In issues arising under a bill in
1507 chancery, where the defendant has under oath directly denied
the allegation, there must be some corroborating evidence for
a single witness.]³ — (W. § 2047.)

ART. 5. *Wills*. In proof of testamentary acts, the following
1508 rules apply:

Par. (a). On an issue of the execution of a *written will*
required to be *attested* at the time of execution, it is not
necessary that the elements of execution be evidenced
by more than one witness, whether he be an attesting
witness or not, and whether his testimony be given in
court or by means of the attestation signed by him.⁴

But this does not dispense with the calling of the
required number of attesters, or with the proof of the
required number of attestations, pursuant to Rule 130,
Arts. 6, 7 (*ante*, §§ 866, 867).

¹ A few Courts have denied this whole exception. A few
others accept it with the bracketed clause.

² A number of States have local rules for one or more crimes;
the list varies widely.

³ Not all Courts continue to maintain this rule.

⁴ A few statutes, however, do provide that the will must
be *proved* by two witnesses.

The first of these is the fact that the system is not a simple one. It is a complex system, and the behavior of the system is not predictable. The second is that the system is not a simple one. It is a complex system, and the behavior of the system is not predictable. The third is that the system is not a simple one. It is a complex system, and the behavior of the system is not predictable. The fourth is that the system is not a simple one. It is a complex system, and the behavior of the system is not predictable. The fifth is that the system is not a simple one. It is a complex system, and the behavior of the system is not predictable. The sixth is that the system is not a simple one. It is a complex system, and the behavior of the system is not predictable. The seventh is that the system is not a simple one. It is a complex system, and the behavior of the system is not predictable. The eighth is that the system is not a simple one. It is a complex system, and the behavior of the system is not predictable. The ninth is that the system is not a simple one. It is a complex system, and the behavior of the system is not predictable. The tenth is that the system is not a simple one. It is a complex system, and the behavior of the system is not predictable.

§§ 1509-1514 REQUIRED NUMBER OF WITNESSES

Cross-reference. The same result is reached by the provision of Rule 130, Art. 6 (*ante*, § 866), declaring that even if an attesting witness when called proves nothing, either because he has no memory or denies the execution, it may be evidenced by other qualified witnesses; for the object of the attesting-witness rule is satisfied by the mere procuring of the testimony of the witness before the tribunal. There is then no rule of the present sort requiring that a certain number must testify affirmatively to sustain the issue.

1509 [Par. (b). Where *no written attestation* of the will at the time of execution is required, the elements of execution must be evidenced by two witnesses or by corroborative evidence additional to a single witness.]¹

1510 Par. (c). On an issue of the execution of a *nuncupative* will, there must be [two][three] witnesses who were present at its making.² — (W. § 2050.)

1511 [Par. (d). On an issue of the execution of a *holographic* will, there must be [two][three] witnesses to the testator's handwriting.]² — (W. § 2051.)

1512 [Par. (e). On an issue of *revocation* or *alteration* of a will, there must be [two][three] witnesses.]⁴ — (W. § 2051.)

1513 [Par. (f). On an issue of a *lost will* not produced, there must be two witnesses to its terms.]⁴ — (W. § 2052.)

Cross-references. (1) For the rule as to the *completeness* of detail of the contents to be proved, see Rule 184 (*post*, § 1561).

(2) For the rule as to measure of persuasion by *preponderance* of evidence, see Rule 227 (*post*, § 2027).

(3) For the rule as to a *copy* being preferred, see Rule 128, Art. 5 (*ante*, § 825).

1514 ART. 6. *Sundry Civil Cases.*^{*}

¹ This is the law in Pennsylvania only.

² The number varies in different States.

³ A few States so enact.

⁴ A dozen States so provide.

⁵ A number of States so require by statute.

^{*} In a few States there are other rules for specific issues.

§§ 1516-1521 WITNESSES REQUIRING CORROBORATION

RULE 180. *Rules of Number for Specific Kinds of Witnesses.*

1516 For the specific kinds of witnesses here enumerated, the
single witness of that kind is not sufficient:

ART. 1. *Accomplice.* In a criminal charge, an accomplice's
1517 testimony alone, uncorroborated by other evidence, is [not]
sufficient.¹ — (W. §§ 2056-2060.)

[*Par. (a).* The corroborative evidence must apply to
1518 the accused's identity as a participant.]²

Par. (b). The judge may caution the jury to scrutinize
1519 with special care the testimony of an accomplice, pursuant
to Rule 5, Art. 4 (*ante*, § 15).

ART. 2. *Woman Complainant.* In a criminal or civil case
1520 involving a wrong by a man to a woman's chastity, or analo-
gous thereto, the complainant woman's testimony alone,
uncorroborated by other evidence, is [not] sufficient.³ —
(W. §§ 2061, 2062.)

This rule applies in issues of
[rape], [seduction],
[enticement for prostitution],
[bastardy],
[breach of marriage-promise].

[[ART. 3. *Illegitimate's Mother.* On an issue of the illegiti-
1521 macy of the child of a married woman, the testimony of
the mother to non-access of her husband during marriage is
not sufficient without corroboration by other evidence.]]⁴ —
(W. § 2063.)

¹ The negative form is law in nearly one-half the juris-
dictions; but in some the rule is limited to felonies, in others,
to specific crimes.

² This applies in jurisdictions taking the negative form.
Any further details of rule, as sometimes laid down, are
futile.

³ A majority of jurisdictions have a statutory rule in the
negative form. The specific issues to which it applies vary
locally.

⁴ This is the original rule, presumably not law anywhere
now.

§§ 1522-1529 WITNESSES REQUIRING CORROBORATION

Cross-references. (1) For the rule *prohibiting the testimony* of either *father* or *mother* in such cases, see Rule 85, Art. 3 (*ante*, § 398).

(2) For the *presumption of legitimacy*, see Rule 228 (*post*, § 2080).

[ART. 4. *Surviving Claimant.* On an issue involving a
1522 claim against the estate of a deceased person, the testimony
of the claimant to a personal transaction with the deceased
from which arose the claim is not sufficient without corrob-
oration by other evidence.]¹ — (W. § 2065.)

Cross-reference. For the rule excluding entirely such testi-
mony, see Rule 84, Art. 2 (*ante*, § 390).

[ART. 5. *Sundry Kinds of Witnesses.* The testimony of a
1523 person of the following classes is not sufficient without
corroboration by other evidence:² — (W. § 2066.)

Par. (a). Children.

1524 *Par. (b).* Chinese, in cases of alien immigration.

1525 *Par. (c).* Prostitutes and private detectives, in divorce
cases.]

ART. 6. *Parties in Divorce.* The testimony of a party in
1526 a divorce suit is not sufficient without corroboration by
other evidence, in the following respects:

1528 [Par. (a). The testimony of the *complainant*.]³ — (W.
§ 2046.)

1529 *Par. (b).* The testimony or extra-judicial confession
or plea of confession of the *respondent*, as to any fact
constituting a ground for divorce.⁴ — (W. §§ 2067-2069.)

¹ This is the law in a few jurisdictions. It is preferable
to the highly impolitic rule, above cited, prohibiting the
testimony entirely.

² Each of these paragraphs is the law in one or two
jurisdictions.

³ This is the rule at common law in two or three States. In
several others, a statute applying to "parties" is made to
include the complainant.

⁴ A few States limit the scope to adultery or cruelty.

§§ 1530-1533 WITNESSES REQUIRING CORROBORATION

ART. 7. *Accused in Criminal Case.* In a criminal case
1530 an extra-judicial confession of the accused is not sufficient,
unless corroborated by other evidence

(1) [tending to confirm the truth of the confession.]¹

(2) [directly relating to the *corpus delicti*.]² — (W.
§§ 2070, 2071.)

Par. (a). The term *corpus delicti* signifies that

1531 (1) the loss or injury alleged has actually occurred;
[(2) and, its occurrence is due to the criminal act of
some person.]³ — (W. § 2072.)

Illustrations. In homicide, the decease of the person; in
arson, the burning of the house; in larceny of a horse, the
disappearance of the horse. Under Clause (2), the additional
evidence would go to negative the deceased's suicide or the
house's accidental burning or the horse's straying.

Cross-references. (1) For the rule that the *corpus delicti*, with
or without a confession, must be evidenced by an *eye-witness*,
see Rule 181, Art. 2 (*post*, § 1536).

(2) For the *definition* of a confession, see Rule 122, Art. 1
(*ante*, § 701).

1532 *Par. (b).* The *order of evidence*, as between the con-
fession and other evidence of the *corpus delicti*, is for the
former to follow the latter, subject to any order which
the trial Court may determine, pursuant to Rule 162
(*ante*, § 1350). — (W. § 2073.)

1533 *Par. (c).* The sufficiency of the other evidence of the
corpus delicti is determined by the trial Court, pursuant to
Rule 163 (*post*, § 1352) and Rule 18 (*ante*, § 52).

¹ Cl. (1) is the rule of a few jurisdictions.

² Cl. (2) is the rule of most jurisdictions.

³ Some Courts unsoundly add Cl. 2.



SUB - TITLE II:

KINDS OF WITNESSES REQUIRED FOR SPECIFIC ISSUES

RULE 181. *General Principle; Eye-Witnesses.* No particular kind or quality of person (other than as qualified by the general rules of Part I, Title II, in this Code) is required as a necessary witness in the proof of any specific issue; — (W. § 2078.)

except that an *eye-witness* of a fact material to the issue is required in the specific issues hereafter mentioned:

(*Reason and Policy.* There is no class of qualified witnesses which in experience has been found specially necessary. For eye-witnesses, the special value of their testimony justifies no rule of requirement as indispensable, because if available they will be secured by the parties' own self-interest, and if they are not available the sufficiency of the other evidence may nevertheless justify a verdict.)

Distinguish the rule of Preference for an *attesting-witness* (Rule 130, *ante*, § 841), which only requires the attester to be called first, if available; the present class of rules makes the testimony of the specific kind of witness to be indispensable, whether called first or not.

ART. 1. *Eye-Witnesses in a Criminal Case.* In a criminal case the prosecution is [not] required to obtain the testimony of

(1) the witnesses who *testified* before the *grand jury*;

(2) the witnesses who had *personal observation* of the alleged criminal act.¹ — (W. § 2079.)

Cross-reference. For the rule *excluding* witnesses who testified before the grand jury but have not been notified to the accused by *indorsement* of their names on the indictment, see Rule 161, Art. 2 (*ante*, § 1327).

ART. 2. *Eye-Witness of Corpus Delicti.* In a criminal case, testimony of an eye-witness to the doing of the alleged criminal act or to the loss or injury involved therein

¹ Only two or three jurisdictions accept the affirmative form of the rule, which is thoroughly unsound.



§§ 1537-1542 REQUIRED KINDS OF WITNESSES

(1) [is required.]¹

(2) [is required where obtainable.]²

(3) [is not required.]³ — (W. § 2081.)

Distinguish the rule that an accused's *confession* must be *corroborated* by some other evidence of the *corpus delicti* (Rule 180, Art. 7, *ante*, § 1530).

Cross-reference. For the definition of *corpus delicti*, see Rule 180, Art. 7 (*ante*, § 1531).

ART. 3. *Eye-Witness or Certificate of Marriage.* On an
1537 issue of marriage, the testimony of an eye-witness of the act
of exchanging consent is not required; — (W. §§ 2083, 2084.)
except in the following classes of trials:

1538 *Par. (a).* It is required in an action for *criminal conver-*
*sation.*⁴ — (W. § 2085.)

1539 [*Par. (b).* It is required in a prosecution for *bigamy.*] ⁵ —
(W. § 2085.)

1540 [*Par. (c).* It is required in a prosecution for *adultery*
or *incest.*]⁶ — (W. § 2085.)

1541 [*Par. (d).* It is required in all criminal cases.]⁷ —
(W. § 2085.)

1542 *Par. (e).* The requirement of an eyewitness is [not]
applicable where the marriage is evidenced by the de-
fendant's *admissions.*⁸ — (W. § 2086.)

¹ Two jurisdictions so provide.

² A few jurisdictions so modify it.

³ Most Courts accept this.

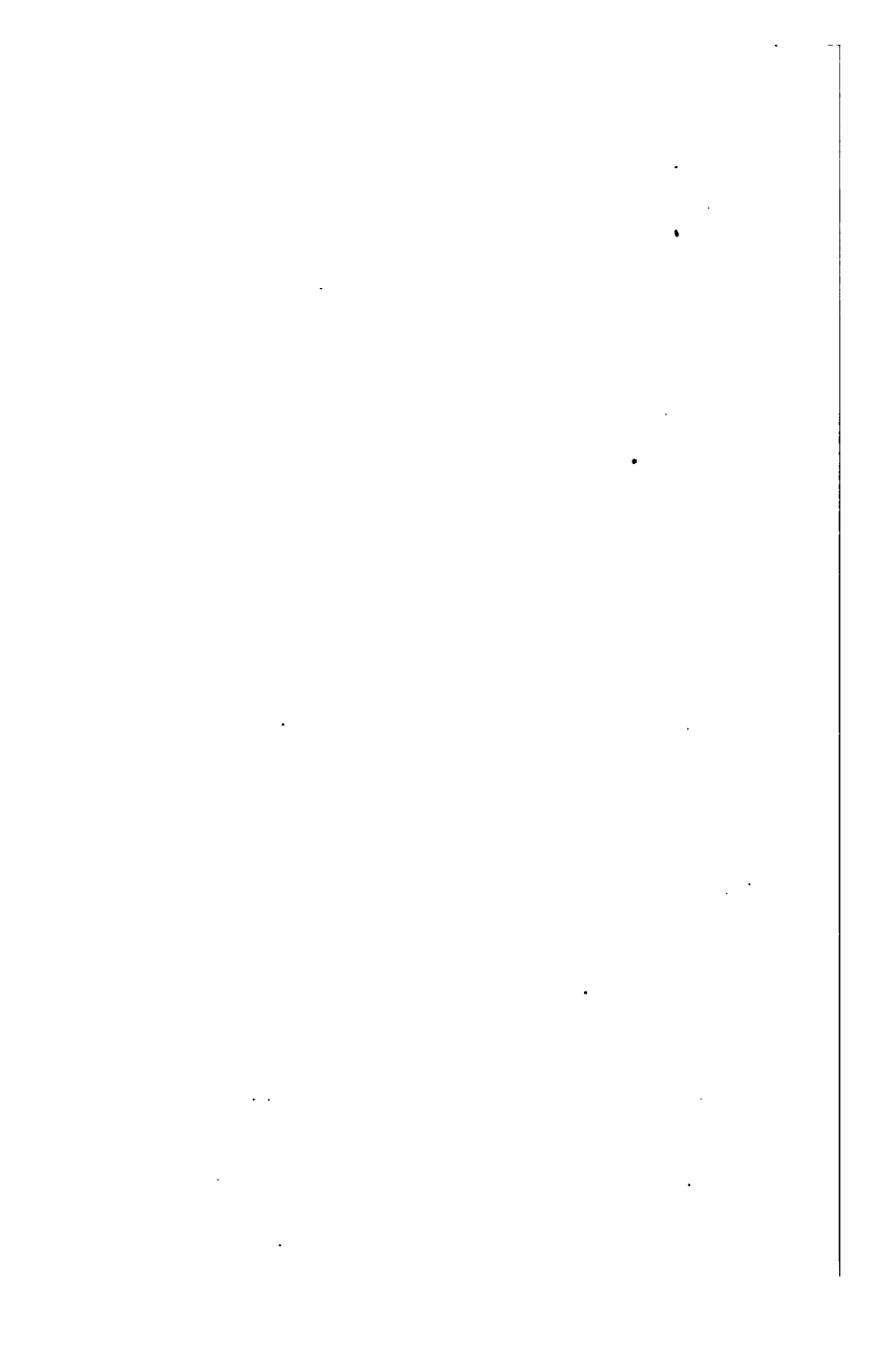
⁴ Probably all jurisdictions accept this; but it is unsound.

⁵ Most jurisdictions now deny this, by statute or by de-
cision.

⁶ Almost all jurisdictions repudiate this.

⁷ Almost all jurisdictions repudiate this.

⁸ A minority of Courts accept the affirmative form for one
or more kinds of litigation.



1543 *Par. (f).* A *certificate* or *register of marriage*, being the statement of an officer present at the formal act of marriage-consent,

(1) is *sufficient* in so far as any rule requiring eye-witness testimony is to be satisfied.

(2) *But* in no event is a certificate or register of marriage required in preference to other eye-witness testimony;

(3) *And* where no rule requires eye-witness testimony, a certificate or register is not required. — (W. § 2088.)

Distinctions. (1) The other usual evidence of a marriage includes the parties' *behavior*, admissible under Rule 63, Art. 3 (*ante*, § 293), the *reputation* in the community, admissible under Rule 147, Art. 3 (*ante*, § 1066), and deceased *family members'* statements, admissible under Rule 40, Art. 5 (*ante*, § 995). One or more of these suffices, in the absence of any rule requiring eye-witness testimony.

(2) Where the substantive law does not make a *formal public act* necessary to the validity of the marriage, and thus *cohabitation* or other informal private exchange of consent is valid, the testimony of an eye-witness will often be unavailable, because there was none, and therefore the indirect effect of the eye-witness rule will virtually be to render the consent invalid if not performed publicly before witnesses.

(3) The *uncorroborated confession* of the *accused* in a *bigamy* charge may be insufficient, under Rule 180, Art. 7 (*ante*, § 1530), and also of a *respondent* in *divorce*, under Rule 180, Art. 6 (*ante*, § 1529).

(4) Whether the *certificate* or *register* of marriage is admissible at all depends on Rule 148 A, Art. 3 (*ante*, § 1103).

1544 [ART. 4. *Owner of Goods in Larceny.* On a charge of larceny, the owner's testimony to his lack of consent to the taking of the goods is required, if obtainable.]¹ — (W. § 2089.)

1545 [ART. 5. *Written Admission of a Sale.* On an issue of goods sold to the value of \$ — there must be some note or memorandum in writing, signed by the party to be charged.]² — (W. § 2091.)

Cross-reference. For the effect of such a writing as essential to the *validity* of the sale, and not merely as necessary evidence of the sale, see Rule 219 (*post*, § 1950).

¹ Three or four jurisdictions accept this unsound rule.

² This covers the Statute of Frauds, where in force.



SUB-TITLE III: VERBAL COMPLETENESS

RULE 182. *General Principle.* (A) In evidencing the tenor of
1547 an utterance material or relevant, made in words, whether written or oral, in original or in copy, the whole of the utterance on a single topic or transaction must be taken together. For this purpose it must be evidenced with

such *precision*, in respect to words,
and such *entirety*, in respect to component parts,
as is necessary to avoid the risk of misrepresenting the utterance;

(B) and in so far as such completeness is not required of the party offering, the opponent may evidence any other parts of the utterance useful to convey its whole tenor;

subject to the exceptions and distinctions in Rules 183 to 185. — (W. §§ 2094-2096.)

(Reason and Policy. Since single words are so capable of important legal effects, precision in the words evidenced is important. And since a thought is frequently complex and may be expressed in several related utterances, other parts may need to be considered for ascertaining the modifications to be applied to the part offered. Nevertheless, since the memory of oral utterances is often imperfect, completeness of tenor is more or less impracticable, and some compromise is necessary. And because the production or copying of an entire set of documents would often be onerous, some line must be drawn. The first part of the rule is designed to insist on the offering party's evidencing of the whole, where less than the whole would commonly be dangerous. The second part of the rule is designed to permit the opponent to cure any misconceptions which may have arisen in the circumstances of the case, but not to license mere hearsay.)

TOPIC A: COMPULSORY COMPLETENESS

RULE 183. *Oral Utterances.* When an oral utterance is to
1548 be evidenced, the offering party must evidence the whole of it;

subject to the following exceptions and distinctions: ¹

¹ The authorities throughout this subject are inclined not to observe fixed definite rules.

ART. 1. *Verbal Precision.* The precise words are not
1549 required in evidencing an oral utterance; the substance or
effect, as literally as feasible, suffices. — (W. § 2097.)

Illustrations. On a charge of murder, a witness who heard
a long altercation between the defendant and the deceased
may testify that the defendant threatened the deceased's life
if he came on the land again, and that the deceased promised
not to do so. Whether the witness can recall any precise
words does not matter.

In particular,

1550 *Par. (a). Admissions and confessions* are governed by
this rule. — (W. § 2098.)

Distinction. A witness' *impression* or *understanding*, as repre-
senting the substance of what was said, may suffice under the
present Rule. But by Rule 174, Art. 2 (*ante*, § 1459), the
prohibition against opinions may exclude it.

1551 *Par. (b). Testimony at a former trial* is governed by
this rule; — (W. § 2098,)

[(1) *except* that the substance must be the *substance* in
facts, and not merely in legal effect.]¹

Illustration. That A in former testimony "proved a writing
of B" would be its legal effect; that he stated his knowledge
of B and B's handwriting and declared that the signature
shown to him was B's would be the substance of A's facts
stated.

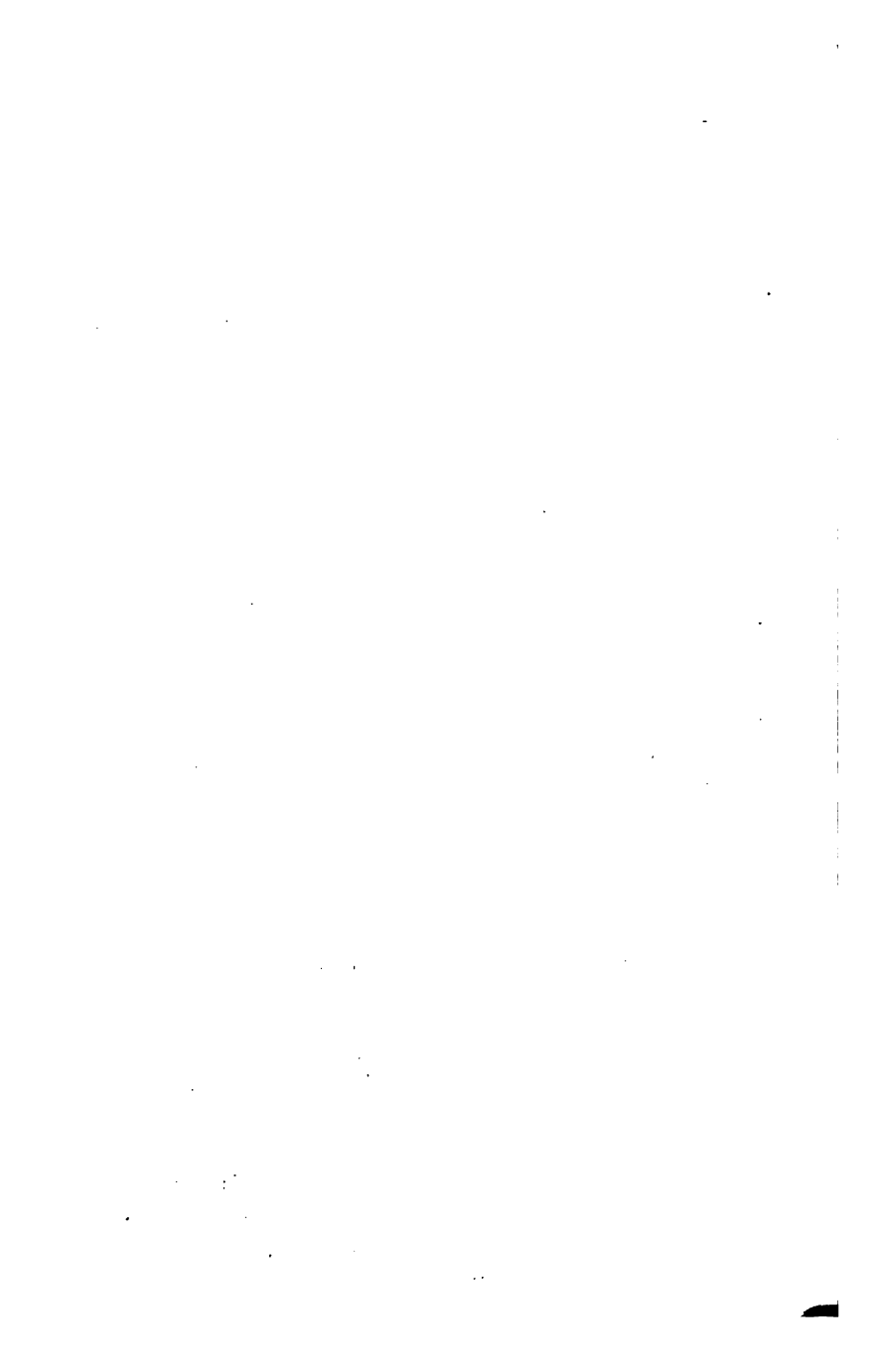
(2) and *except* that *all material parts* of the witness'
testimony on that topic, both on direct and cross-exam-
ination, must be given, pursuant to Art. 2 (*post*, § 1557);
unless a part is offered merely as a *self-contradiction* or
an *admission* to impeach a witness or a party.

(3) and *except* that when the testimony is evidenced
by a *written report* taken stenographically, the rule for
documents is applicable (Rule 184, Art. 1, *post*, § 1562).

1552 [*Par. (c).* But in actions for *defamation* the rule does not
apply, and the precise words must be evidenced.]² — (W.
§ 2097.)

¹ Many Courts make this distinction.

² Most Courts over-strictly so hold. But the doctrine of
variance in pleading is often hard to distinguish.



ART. 2. *Entirety of Parts.* Entirety of parts is not required
 1553 in evidencing an oral utterance; so that the offering party
 need put in only so much as serves his purpose;
 subject to the following exceptions and distinctions:¹ —
 (W. §§ 2099, 2100.)

Par. (a). For utterances constituting a *contract* or other
 1554 legal act, all the essential parts, so far as feasible, must be
 evidenced.

Par. (b). For a witness' *self-contradictions* and an oppo-
 1555 nent party's *admissions*, only the part that serves the
 offering party's purpose need be evidenced.

Par. (c). For *dying declarations*, the whole must be
 1556 evidenced, so far as feasible, pursuant to Rule 138, Art.
 5 (*ante*, § 961).

Par. (d). For *testimony at a former trial*, the material
 1557 parts must be evidenced as provided in Art. 1, Par. (b)
 above.

Par. (e). For a *confession*, the whole must be evidenced,
 1558 so far as feasible;
but a separate utterance at a different time need not
 be evidenced. — (W. § 2100.)

Cross-reference. (1) For the question whether the prosecu-
 tion must omit certain parts, see Rule 185, Art. 1 (*post*, § 1577).

(2) For the question whether the *magistrate's report* must
 be used, see Rule 131, Art. 1 (*ante*, § 891), and Rule 133, Art. 2
 (*ante*, § 902).

ART. 3. *Parts may be Rejected.* Under the general principle
 1559 that the jury determine for themselves the weight to be given
 to evidence (Rule 5, Art. 3, *ante*, § 14), the jury may give such
 credit as they think fit to any parts of an utterance intro-
 duced as a part of the whole under the present Rule. — (W.
 § 2100, n. 3.)

RULE 184. *Documents.* Where a document is available
 1561 for evidence by original or by copy, the whole must be evi-

¹ The authorities here are often not definite.



denced; otherwise, the substance of the material parts suffices; subject to the following exceptions and modifications:

1562 ART. 1. *Document produced in Court.* Where a document is evidenced by original or by copy, the whole of the document is to be introduced in evidence; but the offering party need not read to the jury more than he sees fit; leaving the other parts if desired to be read by the opponent under Rule 185, (*post*, § 1575).¹ — (W. § 2102.)

1563 Par. (a). If the document is a *deposition*, or a report of *testimony at a former trial*, the whole [of the direct examination only,] [so far as pertinent], must be put in, whether used by the taker of the deposition or by the non-taker.² — (W. § 2103.)

1564 Par. (b). If the document is an *opponent's answers to interrogatories* of discovery, its use is governed by Rule 186 (*post*, § 1583).

1565 Par. (c). If the document contains a *reference to another document*, the other must also be evidenced if in the circumstances the latter is requisite to a correct and full understanding of the former. — (W. § 2104.)

1566 ART. 2. *Document lost or destroyed.* If the document is lost or destroyed or is otherwise unavailable in the original (except an existing public record under Art. 3, *post*, 1568), and is therefore evidenced by recollection only or by any means other than a copy, the substance of the material parts suffices.

This rule applies, in particular,

Par. (a). To a *deed* or a *contract*. — (W. § 2105.)

Par. (b). To a *will*. — (W. § 2106.)

Par. (c). To a *public record*. — (W. § 2107.)

¹ This is the fairest solution of a matter on which practice has varied.

² Some Courts accept the two bracketed clauses; some accept one only; some accept neither. It is really a question for the trial Court, under Rule 18 (*ante*, § 52).

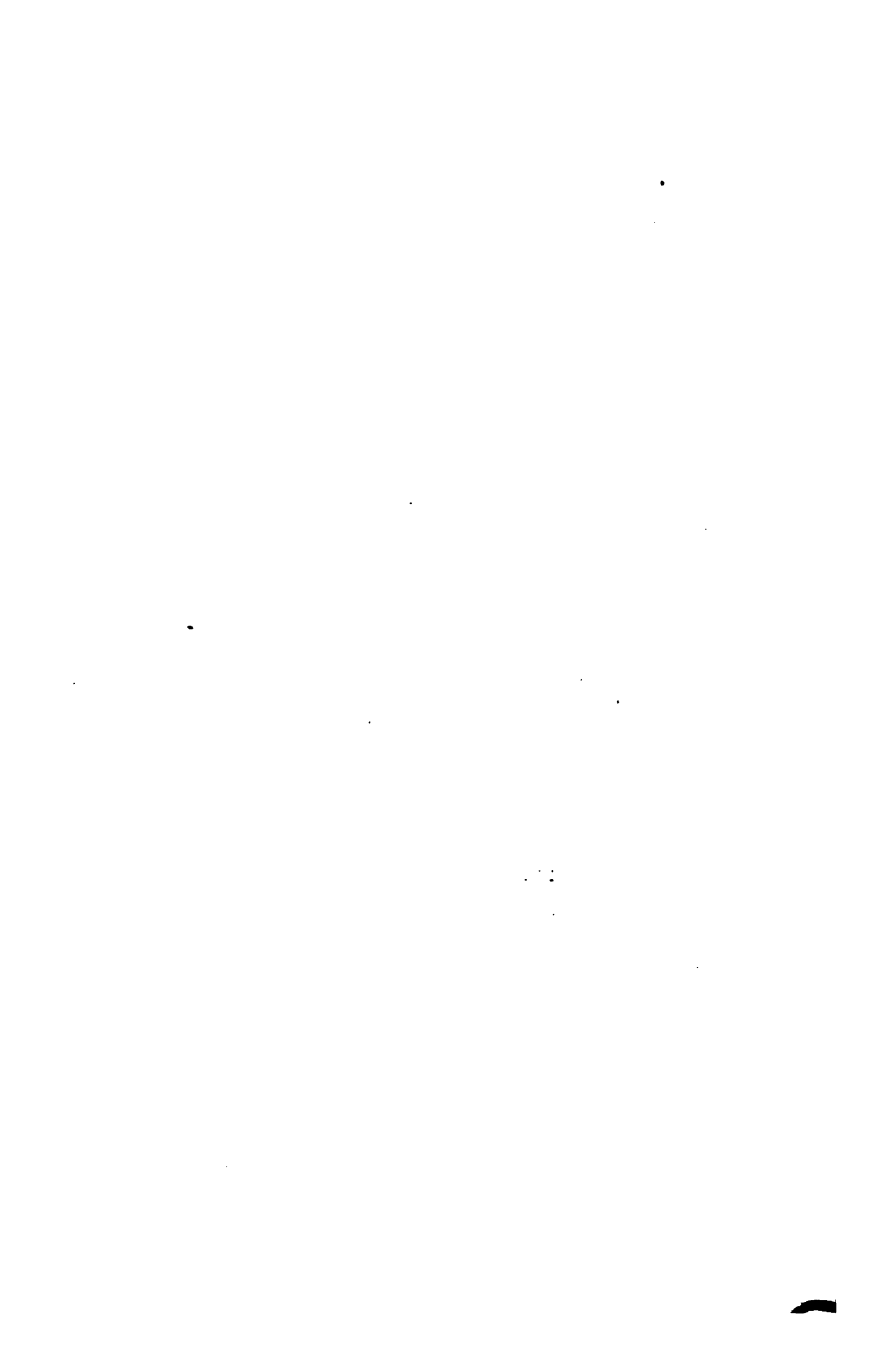


Illustration. A lost deed being material in a chain of title but the only issue being as to the parties, it may be evidenced by a witness who recollects the names of the parties, the sealing and the date of execution, and the general identity of the land, even though the details of the description of the land or of the covenants cannot be given.

Cross-references. (1) For the rule that a *copy* is *preferred*, if it can be had, see Rule 128, Art. 6 (*ante*, § 826).

(2) For the rule that an *abstract* made by a conveyancer is admissible, see Rule 150, Art. 3 (*ante*, § 1183).

(3) For the rule against a witness' *opinion* as to the effect of a document, see Rule 173, Art. 3 (*ante*, § 1451).

(4) For the rule as to a *lost will's* contents being evidenced by two witnesses, see Rule 179, Art. 5 (*ante*, § 1508).

(5) For the rule as to the *measure of persuasion* as to the contents of a *lost will*, see Rule 227, Art. 2 (*post*, § 2027).

1568 ART. 3. *Public Record.* Where the document is a public record existing and accessible for copying, and a copy is used to evidence it, pursuant to Rule 128, Art. 6 (*ante*, § 826), the copy must include all the necessary parts, as follows:— (W. § 2108.)

1569 *Par. (a).* For a *private document* copied into the record, the whole of the document so far as it would have been required under Art. 1, *supra*. — (W. § 2109.)

1570 *Par. (b).* For a series of *official entries*, as many as are relevant to the matters in issue. — (W. § 2109.)

1571 *Par. (c).* For a *judicial record*, the final order of judgment and as much more as may be necessary in the circumstances to avoid misunderstanding or supply material data. — (W. § 2110.)

1572 *Par. (d).* For a record of *conviction of crime*, as much as is needed to identify the offence and the offender.

Cross-reference. For the rule *exempting* from a copy, see Rule 128, Art. 6 (*ante*, § 826).

1573 *Par. (e).* For a *sheriff's* or *tax-collector's* deed on execution, the judgment and the execution.

Cross-reference. For the rule as to using the deed's *recitals* to evidence this, see Rule 148 B, Art. 1 (*ante*, § 1131).

TOPIC B: OPTIONAL COMPLETENESS

RULE 185. *General Principle.* The opponent may introduce
1575 the remainder of an utterance of which any part has been
introduced by the other party;

provided that

(1) No utterance irrelevant to the issue is receivable; and

(2) No more is receivable than such remaining part as
concerns the same subject [and is explanatory of the first
part];¹ and

(3) The remainder thus received is usable to aid in the
construction of the utterance as a whole, and not as testimony
in itself; — (W. § 2113.)

subject to the following exceptions and modifications:

ART. 1. *Parts of Same Utterance admitted.* The present
1576 Rule applies to admit all the parts of a single utterance, oral
or written, of the following classes, among others:

Par. (a). *Conversations in general,*
an opponent's *admissions,*
a witness' *self-contradictions.* — (W. § 2115.)

Cross-references. See also Rule 116, Art. 4 (*ante*, § 635) for
a party's *admissions*, and Rule 108, Art. 6 (*ante*, § 591) for a
witness' *self-contradictions.*

Par. (b). *Confessions of an accused;* — (W. § 2100.)

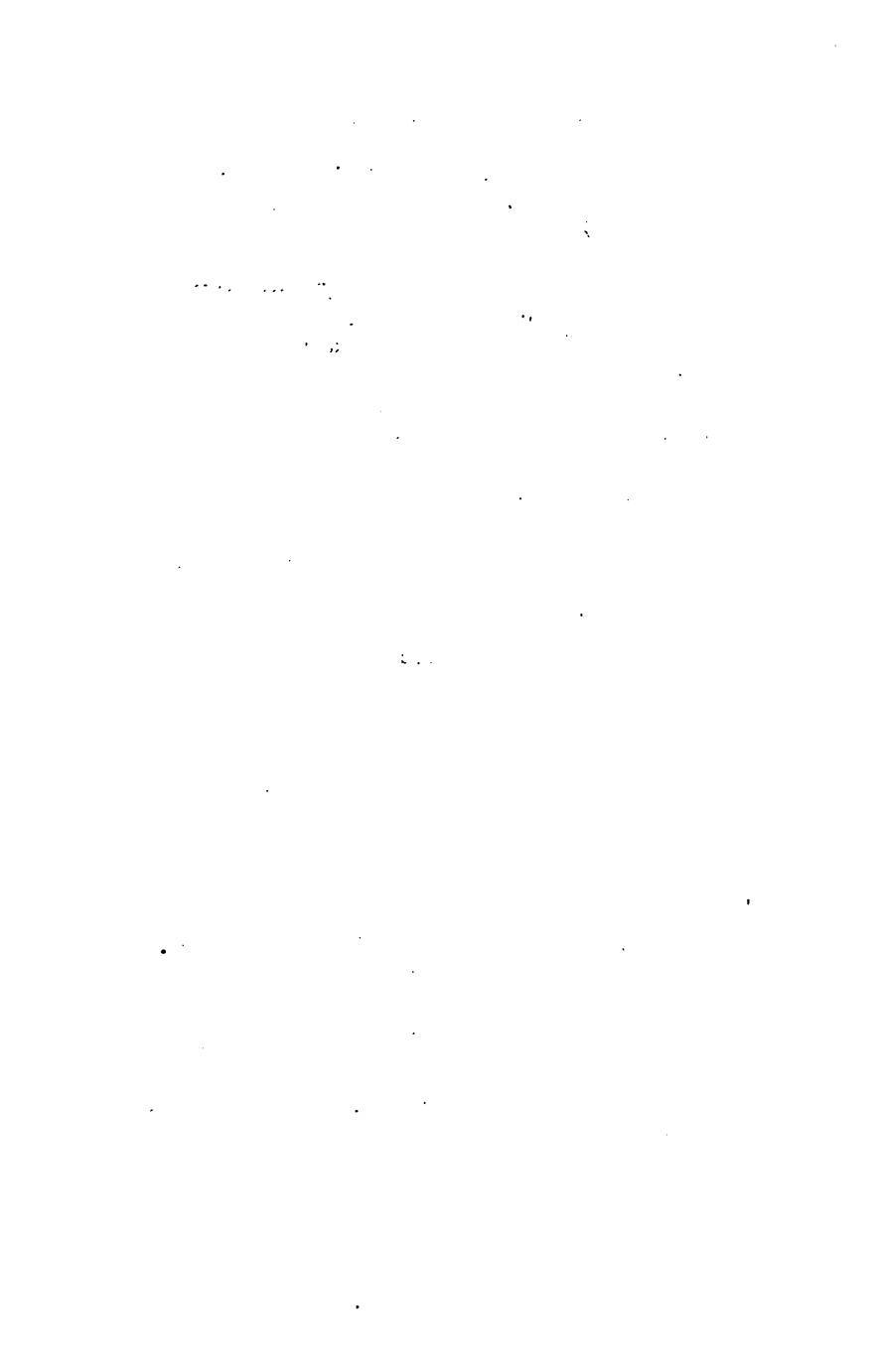
1577 (1) including the mention of *another crime* by the
accused, when contained in one entire statement and
offered by the prosecution;²

(2) *and including* the mention of *another person* as a
participant in the same crime; but here the Court may
instruct the jury not to use the confession against the
other person except as a co-conspirator's admission
under Rule 121 Art 2 (*ante*, § 687).

1578 Par. (c). *Sundry writings, including depositions and*
reports of former testimony. — (W. § 2116.)

¹ This bracketed clause is sound, if its enforcement is left
to the trial Court under Rule 18 (*ante*, § 51), and not quibbled
over. But it is not law in some States.

² The definition is in some Courts stricter. Their desire is to
avoid violating Rule 43, Art. 1 (*ante*, § 219).



1579 *Par. (d). Discharge statements, by a person admitting a charge but also stating something in discharge. — (W. § 2117.)*

1580 **ART. 2. *Separate Utterance excluded.*** The present Rule does not apply to admit an utterance separate in time and form; subject to the following exceptions and modifications: — (W. § 2119.)

1581 *Par. (a). The whole of an account on a subject of which some items have been introduced is admissible. — (W. § 2118.)*

1582 *Par. (b). A prior or subsequent utterance referred to in one already introduced is admissible, so far as it serves to avoid misunderstanding the one introduced. — (W. § 2120.)*

TOPIC C: COMPOSITE RULES

1583 **RULE 186. *Party's Answer to Interrogatories of Discovery.*** The foregoing Rules 182 to 185, concerning compulsory and optional completeness, are applied to a party opponent's answers to interrogatories of discovery as follows:

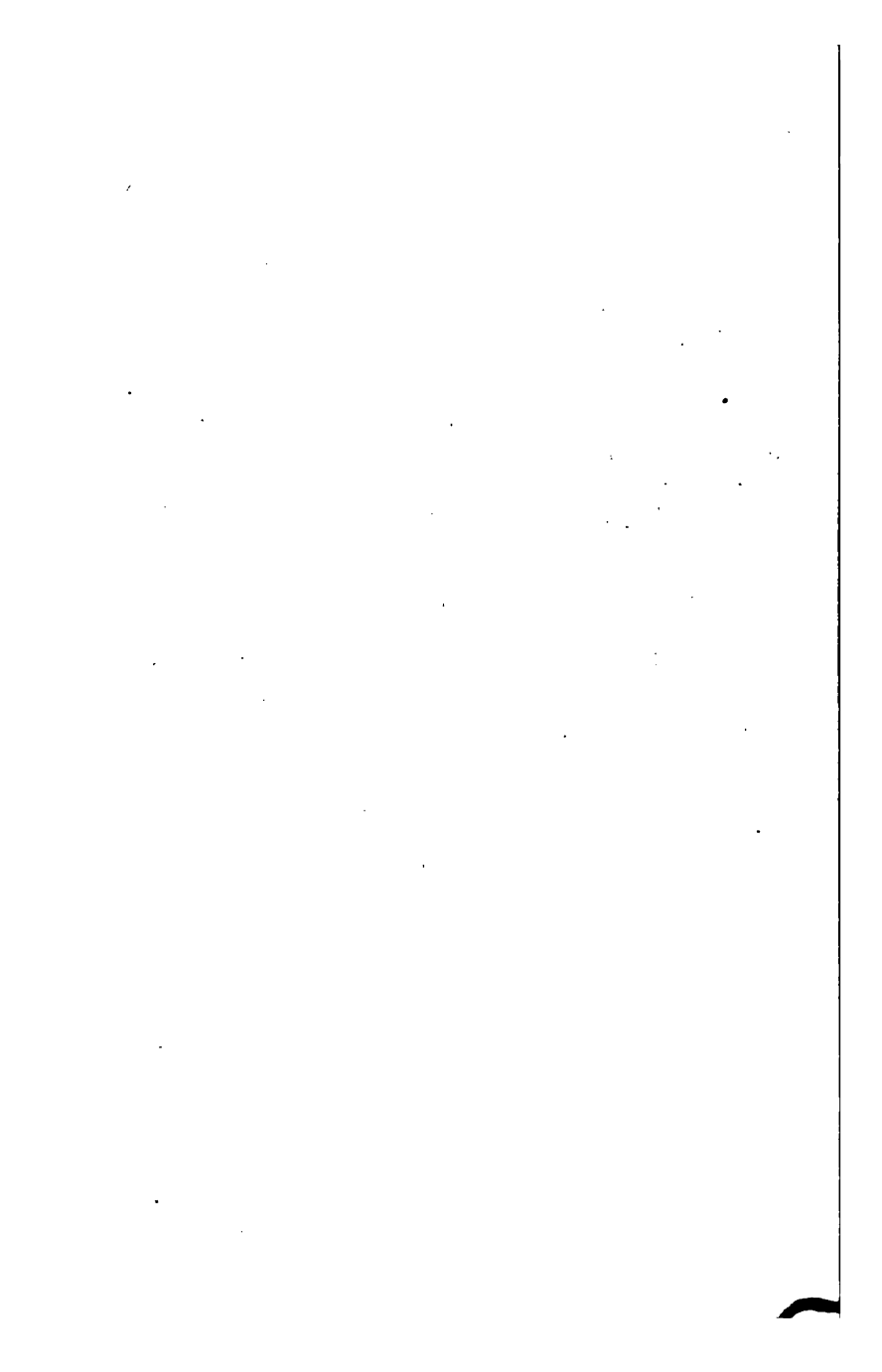
1584 **ART. 1. *Chancery Answer to Bill of Discovery.*** An answer in chancery to a bill of discovery is admissible as follows: — (W. §§ 2121-2123.)

Par. (a). If it is offered in a trial at law, as the party's written admission, the whole must be introduced, pursuant to Rule 184, Art. 1 (ante, § 1562).

1585 *Par. (b). If it is offered in another chancery cause, as the party's admission, the same rule applies.*

1586 *Par. (c). If it is offered in the same chancery cause, as a pleading containing admissions, the plaintiff may use as admissions whatever parts of the answer are so construable without severing statements grammatically connected;*

but the defendant is [not] thereby entitled



(1) to treat any other parts, not so used by the plaintiff, but directly responding to interrogatories, as taken for true; or

(2) to shift upon the plaintiff the burden of proving or disproving any fact so responded to by the defendant, whether negatively or affirmatively, of which the plaintiff would not otherwise have had the burden of proof or disproof.¹

ART. 4. *Party's Answer to Statutory Interrogatories.* A party's answers to interrogatories of discovery authorized by statute are governed by the principle applicable to

(1) [a party's *answer to a bill of discovery*, under Art. 1, Par. (a), (§ 1584), requiring to put in the whole.]¹

(2) [a witness' deposition, under Rule 184, Art. 1, Par. (a) (*ante*, § 1562), requiring to put in such parts as are pertinent.]¹ 2124.)

(3) [a party's *oral admission*, under Rule 183, Art. 2, Par. (b) (*ante*, § 1555), permitting to put in one or more of the answers without putting in the others, except so far as others are so connected as to require in fairness to be read together].² — (W. § 2124.)

1588 Par. (a). The remaining answers may be used by the party making them, under Rule 185 (*ante*, § 1575), so far as they serve to explain the answers already introduced.

1589 RULE 187. *Inspection of Opponent's Document, to admit the Whole.* Where a party during the trial calls for inspection of a document in possession of the opponent, and the inspection is allowed, [no part of] the document so used is thereby treated as introduced in evidence by the party calling for it.³ — (W. § 2125.)

¹ The bracketed clause is law in perhaps the minority of States, but is the only sound one. The rule is not easy to phrase correctly.

² Various Courts or statutes accept one or the other of these forms. The last is the best.

³ The bracketed clause represents the sound rule; though some jurisdictions still recognize the contrary early rule.

SUB - TITLE IV: AUTHENTICATION

TOPIC A: AUTHENTICATION IN GENERAL

RULE 188. General Principle. A writing or other thing
1591 purporting to have been made, sent, authorized, used, or
acted on by a specific person, and desired to be offered as
such, cannot be received for the purpose of being shown or
read to the jury as material or relevant, unless there is also
offered some evidence authenticating the person's supposed
connection therewith.

(Reason and Policy. The general mental tendency is to jump
to the conclusion without evidence, whenever a corporal
object is produced as purporting to be one used or made by
a particular person. The mere sight of it in existence seems
to prove something. This tendency is especially noticeable
with documents. Being a tendency of special danger, the
rules of evidence seek to avoid this danger by enforcing the
logical necessity of offering some evidence of the supposed
connection, before the thing itself is admitted. The specific
rules for this purpose concern chiefly documents).

ART. 1. Chattels, etc. There are no specific rules for the
1592 authentication of chattels or other corporal objects. — (W.
§ 2130, n. 1.)

Illustration. On a prosecution for murder, a knife found stick-
ing in the corpse of the deceased may be introduced upon evi-
dence of such finding. But if the knife is offered as one
found in the possession of the defendant and capable of having
been used for the killing, then there must first be evidence
of such possession. That it was found in his room on the
floor, might suffice; or that it was found in his trunk in an-
other man's room.

Cross-references. (1) The general principle of the judge's
control over sufficiency of evidence (Rule 226, Art. 3, *post*,
§ 2002) disposes of this class of questions.

(2) The various kinds of *evidence of identity*, admissible
under Rule 68 (*ante*, § 333) may here become involved.

(3) The principle of *undue prejudice* by autoptic preference
under Rule 123 (*ante*, § 730) may also here apply.

(4) For the *order of evidence*, see Rule 163, *ante*, § 1352.

the first of these is the fact that the
the second is the fact that the
the third is the fact that the
the fourth is the fact that the
the fifth is the fact that the
the sixth is the fact that the
the seventh is the fact that the
the eighth is the fact that the
the ninth is the fact that the
the tenth is the fact that the
the eleventh is the fact that the
the twelfth is the fact that the
the thirteenth is the fact that the
the fourteenth is the fact that the
the fifteenth is the fact that the
the sixteenth is the fact that the
the seventeenth is the fact that the
the eighteenth is the fact that the
the nineteenth is the fact that the
the twentieth is the fact that the
the twenty-first is the fact that the
the twenty-second is the fact that the
the twenty-third is the fact that the
the twenty-fourth is the fact that the
the twenty-fifth is the fact that the
the twenty-sixth is the fact that the
the twenty-seventh is the fact that the
the twenty-eighth is the fact that the
the twenty-ninth is the fact that the
the thirtieth is the fact that the
the thirty-first is the fact that the
the thirty-second is the fact that the
the thirty-third is the fact that the
the thirty-fourth is the fact that the
the thirty-fifth is the fact that the
the thirty-sixth is the fact that the
the thirty-seventh is the fact that the
the thirty-eighth is the fact that the
the thirty-ninth is the fact that the
the fortieth is the fact that the
the forty-first is the fact that the
the forty-second is the fact that the
the forty-third is the fact that the
the forty-fourth is the fact that the
the forty-fifth is the fact that the
the forty-sixth is the fact that the
the forty-seventh is the fact that the
the forty-eighth is the fact that the
the forty-ninth is the fact that the
the fiftieth is the fact that the
the fifty-first is the fact that the
the fifty-second is the fact that the
the fifty-third is the fact that the
the fifty-fourth is the fact that the
the fifty-fifth is the fact that the
the fifty-sixth is the fact that the
the fifty-seventh is the fact that the
the fifty-eighth is the fact that the
the fifty-ninth is the fact that the
the sixtieth is the fact that the
the sixty-first is the fact that the
the sixty-second is the fact that the
the sixty-third is the fact that the
the sixty-fourth is the fact that the
the sixty-fifth is the fact that the
the sixty-sixth is the fact that the
the sixty-seventh is the fact that the
the sixty-eighth is the fact that the
the sixty-ninth is the fact that the
the seventieth is the fact that the
the seventy-first is the fact that the
the seventy-second is the fact that the
the seventy-third is the fact that the
the seventy-fourth is the fact that the
the seventy-fifth is the fact that the
the seventy-sixth is the fact that the
the seventy-seventh is the fact that the
the seventy-eighth is the fact that the
the seventy-ninth is the fact that the
the eightieth is the fact that the
the eighty-first is the fact that the
the eighty-second is the fact that the
the eighty-third is the fact that the
the eighty-fourth is the fact that the
the eighty-fifth is the fact that the
the eighty-sixth is the fact that the
the eighty-seventh is the fact that the
the eighty-eighth is the fact that the
the eighty-ninth is the fact that the
the ninetieth is the fact that the
the ninety-first is the fact that the
the ninety-second is the fact that the
the ninety-third is the fact that the
the ninety-fourth is the fact that the
the ninety-fifth is the fact that the
the ninety-sixth is the fact that the
the ninety-seventh is the fact that the
the ninety-eighth is the fact that the
the ninety-ninth is the fact that the
the hundredth is the fact that the

ART. 2. *Brands on Animals and Logs.* The presence or a
1593 purporting brand or mark customarily used by a particular
person on stock-animals, timber-logs, etc., is sufficient evidence
to admit the mark to be used as evidence of identity or of
ownership, under Rule 41, Art. 2 (*ante*, § 198).

ART. 3. *Telephone-Message.* A telephone message, pur-
1594 porting to come from a particular person, may be sufficiently
authenticated as to the person

(1) by the person's *voice*, as recognized by the hearer;

(2) by the person's subsequent admissions, by the tenor of
the message, or by other *circumstances*;

(3) if a *reply-message*, by the message purporting to come in
answer to a call made in the customary manner by using the
name and number of a specific person.]¹ — (W. § 2155.)

Par. (a). On an issue as to the *authority* of a person
answering on behalf of another, or from his office, there
must be other evidence than the mere purporting message.

Par. (b). Where the message is evidenced to have been
spoken by an operator or other person as an *intermediary*,
at the request of a party to the case, the intermediary
is agent to transmit, and the message as spoken by him
is receivable. — (W. § 669, § 2155, n. 8.)

¹ This Clause 3 is law in a few Courts, and is safe.

TOPIC B: AUTHENTICATION OF DOCUMENTS

1595 RULE 189. *General Principle.* No writing alleged or pur-
 porting to have been made, sent, authorized, used or acted
 on by a specific person, and desired to be offered as such, may
 be read or shown to the jury unless upon some evidence of
 such person's connection, sufficient to satisfy the ensuing
 Rules 189-192, or to satisfy the judge on the circumstances
 of the particular case under the general principle of Rule 226,
 Art. 2 (*post*, § 2002.)

1596 ART. 1. *Kinds of Evidence.* The evidence thus sufficient
 may be any admissible evidence of one of the three general
 sorts;— (W. § 2131) namely:

(1) Autoptic proference (Real evidence);

Illustration. The party or witness writing his name in the
 jury's presence in court.

(2) Testimonial evidence;

Illustration. A witness who saw the document written or
 used; any person qualified under Rule 87, Art. 3 (*ante*,
 § 418). The party's extra-judicial admission that he used or
 wrote it.

(3) Circumstantial evidence.

Illustrations. (1) Style of handwriting, under Rule 36,
 Art. 1 (*ante*, § 171), as evidenced in its turn by witnesses
 who know the person's style, under Rule 87, Art. 3 (*ante*,
 § 418) or are expert in handwriting, under Rule 177, Art. 3 (*ante*,
 § 1480), or by specimens of the person's handwriting, under
 Rule 66, Art. 5 (*ante*, § 321) and Rule 173, Art. 5 (*ante*, § 1488).

(2) Sundry circumstances in the nature of motive, design,
 traces, and the like, under the general rules of circumstantial
 evidence.

(3) Specific circumstances, giving rise to the specific rules
 of sufficiency (Rules 189-193, *post*, §§ 1595, 1633).

ART. 2. *Authentication, when Unnecessary.* Evidence to
1597 authenticate a writing is not needed whenever the fact of its
use, making, or authorizing by a specific person is

- (1) immaterial under the issues;
 - (2) or conceded under the issues;
- subject to the following details: — (W. § 2132.)

1598 *Par. (a).* Evidence to authenticate is not necessary
when *only* the document's *contents* or *existence* is material.

Illustration. (1) In an action of trover for bonds, the identity of the bonds involves merely the purporting signatures, hence their genuineness need not be evidenced; unless on the issue of damages their value depends on genuineness.

(2) Under a claim of title by adverse occupation, the occupier's scope of possession may depend on the description in certain deeds giving color of title; but their genuineness is immaterial and need not be evidenced for this purpose.

1599 *Par. (b).* Evidence to authenticate is not needed where
by the pleadings or by stipulation or by other form of
judicial *admission* under Rule 231 (*post*, § 2140) the execution of the document is conceded by the opponent;
in particular,

(1) where the opponent makes *claim* or *defence* under the same instrument, as provided in Rule 130, Art. 4 (*ante*, § 846);

(2) but *not* where the opponent merely has possession of the instrument and *produces it on demand* without making claim or defence under it, as provided in Rule 130, Art. 4 (*ante*, § 846).

1600 *Par. (c).* Evidence to authenticate is not dispensed
with by an opponent's *extra-judicial admission*, *i. e.* as defined in Rule 116, Art. 4 (*ante*, § 635), which is merely some evidence of authentication as declared in Art. 1, *supra*.

In particular,

(1) The opponent's *destruction* or *spoliation* of the document is not a conclusive or judicial admission, but merely some evidence, admissible as provided in Rule 118, Art. 4 (*ante*, § 654).

1601 *Par. (d).* Evidence to authenticate is not dispensed
with by evidence of *loss* or other circumstance *dispensing*



with production of the original under Rule 126, Art. 3 (ante, § 754). — (W. § 1188.)

1603 ART. 3. *Order of Evidence of Authenticity, Loss, and Contents.* Where a document is said to be lost or otherwise not producible in the original, so as to be evidenced by copy, the order of evidence for the facts of loss, contents, and execution is as provided in Rule 126, Art. 2 (*ante*, § 751).

1604 ART. 4. *Authentication-Rules of Sufficiency and of Presumption.* The ensuing rules merely declare certain circumstantial evidence to be sufficient evidence to permit the document to go to the jury (Rules 90-193, §§ 1608-1643), and do not create any presumption of execution (on the principle of Rule 226 Art. 2, *post*, § 1999) except where expressly so provided. — (W. § 2135.)

1605 ART. 5. *Other Rules for Documents distinguished.* The rules for Authentication of documents have no relation to the evidential rules on the following topics concerning documents, elsewhere provided for in this Code:

- (1) the *possession* of a document to evidence *knowledge* of its contents, under Rule 62, Art. 12 (*ante*, § 289).
- (2) the *possession* of an instrument of obligation, to evidence its *discharge*, under Rule 41, Art. 6 (*ante*, § 202).
- (3) the presumption of identity of person from *identity of names* in a document, under Rule 228 (*post*, § 2082).
- (4) the preference for an *attesting-witness* to evidence the execution of the document, under Rule 130 (*ante*, § 841).
- (5) the *degree of persuasiveness* required for the evidence of execution of a *lost will*, under Rule 227 (*post*, § 2029).
- (6) the presumption of *delivery*, from proof of *signing* a deed, under Rule 228 (*post*, § 2069).
- (7) the presumption as to an *alteration* being made *before* or *after* execution, under Rule 228 (*post*, § 2069).
- (8) the presumption as to the existence of a *lost grant*, under Rule 228 (*post*, § 2069).
- (9) the admissibility of a *recital* in an *ancient deed* to evidence the existence of another and lost deed, under Rule 145 (*ante*, § 1040).

TOPIC C:

SPECIFIC RULES OF SUFFICIENCY FOR AUTHENTICATION OF
DOCUMENTS BY CIRCUMSTANTIAL EVIDENCE

1608 **RULE 190. *Authentication by Age of Document.*** A document which has been in existence for thirty years, is produced from a custody appropriate under the circumstances, and bears no appearance raising suspicion of fraud, is admissible, without other evidence of authenticity. — (W. § 2137.)

(*Reason and Policy.* After the lapse of a generation, testimony by witnesses knowing the handwriting is likely to be unavailable. The three circumstances mentioned are of considerable weight in combination. The likelihood of a forgery for the benefit of a future generation is small.)

1609 **ART. 1. *Age.*** The document must be evidenced to have existed for thirty years, and the actual date cannot be merely assumed from the purporting date of execution. — (W. § 2138.)

1610 *Par. (a).* The time is reckoned from the time of existence of the document (not of its taking effect in law) to the time of offering in court (not to the time of suit begun).

1611 **ART. 2. *Custody.*** The custody may be that of any place or person where under the circumstances that particular document would naturally be found if genuine. — (W. § 2139.)

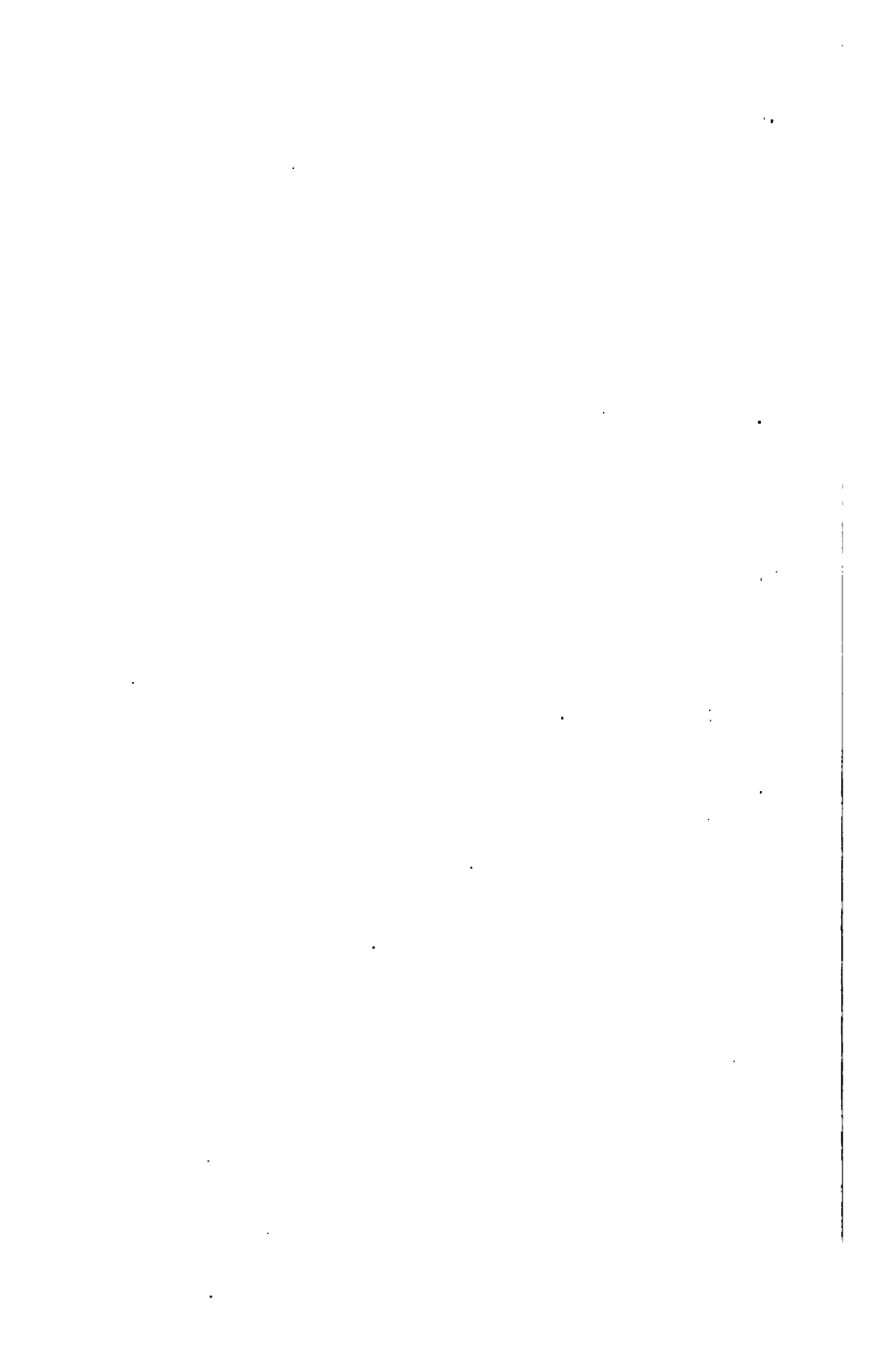
Illustration. A counterpart of a lease, found in the lessor's possession; an old plan, found in the town-clerk's records.

1612 **ART. 3. *Appearance.*** The document must not bear any appearances raising suspicion of fraud in making or altering the document. — (W. § 2140.)

1613 **ART. 4. *Possession of Property described.*** Where the document purports to give an interest in real property, an occupation of the land, during some part of the time since the purporting date of execution, by the party claiming under it or his predecessor,

(1) [is also necessary.]

(2) [is also necessary, or else some other circumstance,



such as the claimant's payment of taxes or the non-occupation by adverse claimants, indicating the absence of doubt of the document's genuineness.]

(3) [is not necessary.]¹ — (W. § 2141.)

ART. 5. *Original and Copy ; Recorded Deeds.* The foregoing 1614 rule is applied as follows where a copy of a deed or will is concerned: — (W. § 2143.)

Par. (a). Where an alleged ancient *original* is *lost*, and a purporting *ancient copy*, not official and otherwise unauthenticated, is offered, the copy is admissible on the same conditions defined in Arts. 1-4.

1615 *Par. (b).* Where an alleged ancient *original* is *lost*, and a purporting ancient *official record* or *record-copy* exists which is not admissible under Rule 148 A, Art. 5 (*ante*, § 1110) because the record was not made in pursuance to authority, the ancient record, or the ancient record-copy (or a duly certified copy newly made from the record) [is admissible.]²

1616 *Par. (c).* Where an ancient *original* is *produced*, an official *record* of it, or copy thereof, which would be inadmissible under Rule 148 A, Art. 5 (*ante*, § 1110) because not made in pursuance to authority, is receivable in corroboration [and to supply any requirement of Art. 4 above].³

1617 ART. 6. *Authority to Execute.* When a document is admissible under the conditions of Arts. 1-5 above, the same circumstances suffice as evidence of the existence of any agent's authority, or other fact necessary to valid execution, which purports in the document to have existed. — (W. § 2144.)

¹ These differing rules are favored in different jurisdictions.

² Here there are numerous statutes, varying in detail in different jurisdictions. Most of them lessen the period to twenty years; some require possession; most are limited to deeds.

³ This applies where Clauses 1 or 2 of Art. 4 are in force. Statutes sometimes cover this.

ART. 7. *Kinds of Documents.* The foregoing rules, where
1618 not otherwise expressly declared, apply to any kind of docu-
ment. — (W. § 2145.)

RULE 191. *Authentication by Contents.* The genuineness of
1620 a document may be sufficiently evidenced by its contents,

(1) if the subject of the communication is one peculiarly
in the knowledge of the alleged author;

[[or, (2) if the document bears a stamp or imprint purport-
ing to describe a particular person as author or publisher.]]¹ —
(W. §§ 2148, 2149.)

Illustrations. (1) In a notice of a bank-balance overdrawn
the reference to the bank deposit may suffice to authenticate
it as coming from a bank's officers.

(2) Newspapers, books, letter-heads may suffice, as pro-
vided in Arts. 1-3.

[ART. 1. *Printed Matter.* In a printed book, pamphlet,
1621 periodical, or newspaper, the purporting printed name of the
author and the publisher is sufficient to authenticate it.]² —
(W. § 2150.)

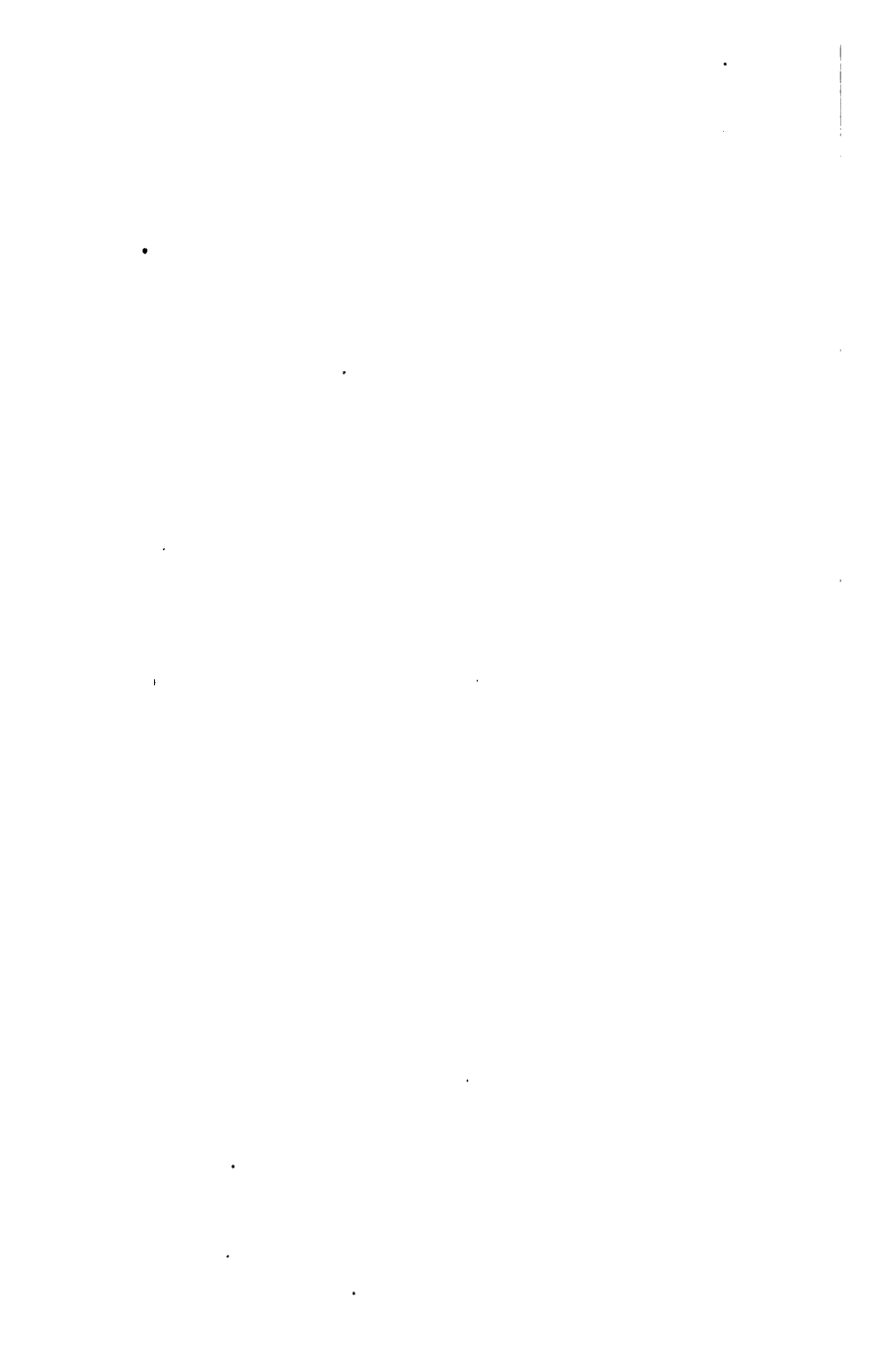
1622 *Par. (a).* A printed volume purporting to contain a
copy of a legislative statute, municipal ordinance, adminis-
trative regulation, or judicial decision, domestic or foreign,
and to be printed *by official authority*, is sufficiently
authenticated to make the copy admissible under Rule
148 C, Art. 10 (*ante*, § 1164.)³ — (W. § 1684.)

1623 *Par. (b).* A printed volume purporting to contain
a legislative statute or a judicial decision, and *not* pur-
porting to be printed by *official authority*, is sufficiently
authenticated if it purports to be one of an issue or series
which is otherwise evidenced or judicially known to be
commonly treated and used by the legal profession as

¹ This is not yet law, in so broad a form. But it ought to
be, to correspond to the facts of commercial usage.

² This is law in perhaps a few jurisdictions only; but it is
the only sensible rule. The current practice is absurdly over-
technical.

³ Nearly every State has a statute to this effect.



authentic in the jurisdiction in question and therefore to be a copy admissible under Rule 150, Art. 1 (*ante*, § 1181). — (W. §§ 1684, 1703.)

ART. 2. *Postmark*. On an envelope or cover the impress
1624 purporting to be the postmark of a government postal officer canceling the mail is sufficiently authenticated to make the postmark admissible under Rule 148 C, Art. 5 (*ante*, § 1151). — (W. § 2152.)

ART. 3. *Reply-letter*. A letter arriving by course of mail
1625 purporting to come in reply to a communication sent to the purporting author is sufficiently authenticated. — (W. § 2153.)

Cross-reference. For the rule that the *mailing* of a letter to the addressee is evidence of its *due arrival*, see Rule 36, Art. 1 (*ante*, § 171).

[ART. 4. *Reply-telegram*. A telegram arriving in due
1626 course purporting to come in reply to a communication sent to the purporting author is sufficiently authenticated.]¹ — (W. § 2154.)

Cross-reference. For the rule as to authenticating a *reply-telephone* and a *brand* on stock or timber, see Rule 188, Arts. 2, 3 (*ante*, §§ 1593, 1594).

ART. 5. *Identity of Name*. In applying the foregoing rules,
1627 identity of name is sufficient evidence of identity of person; but no presumption arises except according to Rule 228, Art. 21 (*post*, § 2082).

RULE 192. *Authentication by Official Custody*. The existence
1630 of a document in the appropriate official custody is sufficient to authenticate

(1) An *official* document.

[(2) A *private* document required or authorized to be
filed in official custody,
provided (a) the document is of a class required to be
evidenced as genuine to the custodian before filing, so that

¹ A majority of the Courts have not yet accepted this; but it is sound.



his record or certificate would be admissible under Rule 148 A, Art. 5 (*ante*, § 1110), or under Rule 148 C, Art. 2 (*ante*, § 1147), or Art. 6 (*ante*, § 1152),

(b) or, the document has been treated as genuine, in judicial proceedings, by the Court or by the party now charged.]¹ — (W. §§ 2158, 2159.)

1631 ART. 1. *Witnesses to Custody.* The testimony to official custody may be that of

(1) the *official custodian* himself, either testifying in court to the original document, or certifying a copy under Rule 148 A, Art. 5 (§ 1110), Rule 148 C, Art. 2 (*ante*, § 1147), or Art. 6 (*ante*, § 1152).

(2) or, a *private person*, testifying to the original or to a copy, who has seen the original in the proper official custody.² — (W. § 2158.)

Distinguish the question whether the original is *forbidden to be removed* from official custody into court, under Rule 196 (*post*, § 1654).

1633 RULE 193. *Authentication by Official Seal or Signature.* An impression purporting to be the seal or stamp of an officer sufficiently authenticates the document bearing it;

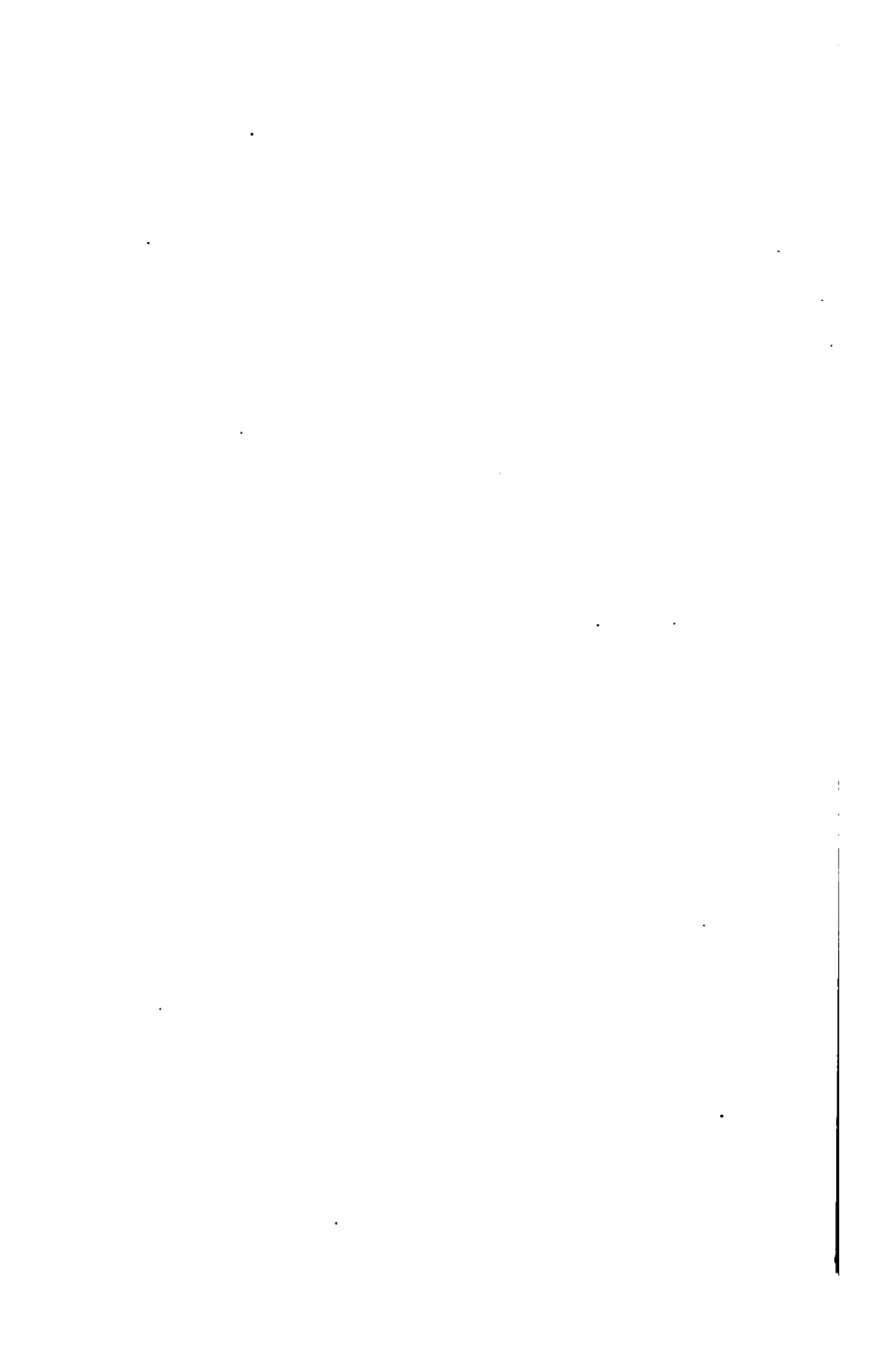
subject to the following exceptions and distinctions: — (W. § 2161.)

(*Reason and Policy.* In the frequent daily use of official documents, great inconvenience and expense would be caused if direct testimony to their genuineness were required. The forgery of the official seal would be a crime. Detection would be not difficult. In experience, such falsification is relatively rare. Hence the purporting impression of such a seal is circumstantially sufficient.)

1634 ART. 1. *Authentication, Hearsay Exception, Judicial Notice, distinguished.* When any document is offered as an official statement admissible under Rule 148 (*ante*, § 1090), and bears the purporting seal of the officer, and the offer thus involves three elements,

¹ There is little authority on Clause (2), but the above seems a practical rule.

² A few statutes anomalously require a private copy to bear an official seal.



(1) that such an *officer's statement is admissible* to evidence the fact stated;

(2) that the person named is *such an officer*; and

(3) that the document was *genuinely executed by that officer* by affixing his seal or stamp,

(1) the first element is governed by Rule 148 (*ante*, § 1090), determining the admissibility of official statements;

(2) the second element is governed by Rule 229 (*post*, § 2120), permitting judicial notice to be taken of the incumbency and official character of certain persons;

(3) the third element is governed by the present Rule. — (W. § 2161.)

1635 *Par. (a).* Wherever under the present Rule the genuineness of the seal or stamp is taken as sufficiently evidenced, the *official character* or incumbency of the person using it is also judicially noticed, unless otherwise expressly provided. — (W. § 2168.)

1636 *Par. (b).* Wherever under the present Rule the purporting seal is *not sufficient evidence* of its genuineness, and other evidence is therefore needed, it may be supplied by an *official certificate of genuineness* appended thereto, and made by another officer duly authorized, so as to be admissible as an official statement under Rule 148 C (*ante*, § 1145). In such case, the genuineness of the additional certificate bearing a purporting seal of that officer will always be assumed, under the present Rule.

Illustration. (1) Where a purporting foreign notary's certificate of execution of a deed is offered, the present Rule determines whether the seal is assumed genuine. If not, Rule 148 C determines that an American consul's certificate of genuineness is admissible; and the present Rule then declares the Consul's purporting seal to be presumed genuine.

(2) Where a certified copy of a judicial record in another State is offered, and the clerk's certificate is admissible for the purpose under Rule 148 C, the genuineness of the clerk's certificate (*a*) will in some States be presumed from the purporting seal of court, but (*b*) under the Federal statute, it will not be assumed, and the judge's certificate of genuineness must be furnished, but this will be assumed genuine.

1637 *Par. (c).* Wherever under the present Rule the purporting seal is not sufficient evidence of its genuineness,

testimony to its genuineness may be given *on the stand* by a qualified person.

ART. 2. *Seal of State.* The purporting seal of State, of 1638 either a domestic or a foreign State or of a United States Territory or Dependency, is assumed genuine. — (W. § 2163.)

ART. 3. *Seal of Court.* The purporting seal of the following 1639 courts will be assumed genuine:

- (1) a court of record within the jurisdiction;
- (2) a court of record in another State, Territory, or Dependency of the United States;
- [(3) a court not of record, within the county;]
- (4) any Federal court.¹ — (W. § 2164.)

Distinguish the requirement of Rule 148 C, Art. 7 (*ante*, § 1160), under the Federal statute, that both the clerk and the judge must make certificates for a copy of the record; the seal of the court is assumed genuine.

ART. 4. *Seal of Notary.* The purporting seal of a notary, 1640 foreign or domestic, is assumed genuine, wherever his certificate is offered for the purpose of evidencing the fact of dishonor of commercial paper [or any other fact for which it is admissible under Rule 148 C, Art. 1 (*ante*, § 1146).]² — (W. § 2165.)

ART. 5. *Seal of Sundry Officers.* The purporting seal of 1641 the following other officers will be assumed genuine:— (W. § 2166.)

- (1) a Federal officer;
- (2) a domestic State officer;
- (3) a domestic county officer [within the county];
- [(4) an officer of another State, Territory, or Dependency of the United States;]³
- (5) a municipal corporation.

¹ The statutes vary. Substantially all Courts and statutes agree on the above, except as to (3).

² Some Courts decline to accept the bracketed clause, but without sufficient grounds.

³ This is covered by numerous statutes.



ART. 6. *Official Signature.* The purporting signature of an
1642 official is not assumed genuine.¹

ART. 7. *Seal of a Corporation.* (1) The purporting seal of
1643 a private corporation is [not] assumed genuine.

(2) When the genuineness of the seal is evidenced, the due
consent and authority of the corporation to affix the seal is
[not] thereby assumed.² — (W. § 2169.)

¹ There are numerous local exceptions by statute for
specific officers.

² There is authority for the bracketed words in each of these
clauses.



PART III:

RULES OF EXTRINSIC POLICY

1650 **RULE 194. *Definition and Classification.*** The third group of rules of Admissibility, as defined and classified in Rule 12 (*ante*, § 37), comprises those rules which allow certain extrinsic policies, important to the community in general, to override temporarily the purpose of ascertaining the truth, and therefore to exclude certain facts irrespective of their probative value.

Such rules are either *absolute* or *optional*.

The absolute rules depend on a fixed general policy, and are enforced by the judge on application of the party like other rules of evidence.

The optional rules depend on a policy protecting the interest of particular classes of persons only, and are enforced only on demand by such person. The personal option granted by these rules is termed a Privilege. — (W. § 2175.)

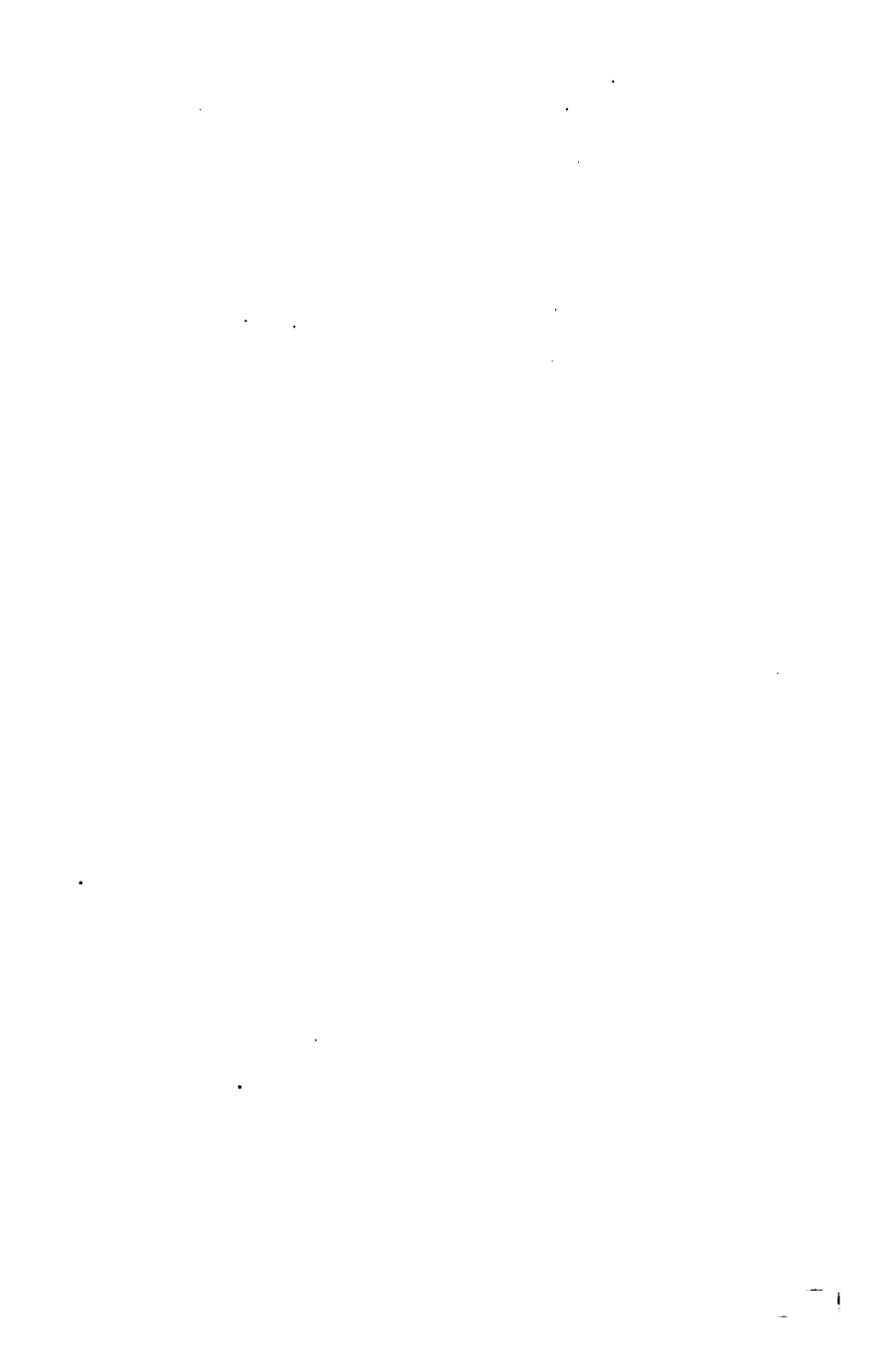
TITLE I: RULES OF ABSOLUTE EXCLUSION

1652 **RULE 195. *Evidence involving Public Indecency.*** Wherever the introduction of evidence would cause under the circumstances undue pruriency in bystanders or undue embarrassment and shame in a witness, the trial judge may exclude it, having regard to the slight relative value of the evidence and the impracticability of otherwise ascertaining the truth.¹ — (W. § 2180.)

Cross-reference. For the application of this policy to the specific process of autoptic preference, see Rule 123, Art. 2 (*ante*, § 732).

1654 **RULE 196. *Evidence involving Public Inconvenience.*** Whenever the production of documents from public records would involve danger to the integrity of the records or

¹ Some such rule as this is presumably now law.



inconvenience to the public or to public officers in using the records, the production of the originals may be forbidden by the judge.¹ — (W. § 2182.)

Cross-reference. (1) For the privilege as to *non-attendance*, see Rule 200 (*post*, § 1689). (2) For the privilege as to *official secrets*, see Rule 210, Art. 2 (*post*, § 1845).

RULE 197. *Evidence involving Illegality.* An evidential fact, 1656 otherwise admissible, is not excluded

(1) because it has been obtained by means of some violation of law;

(2) nor because its existence is attended with some violation of law;

unless expressly so provided by the statute defining the violation of law. — (W. §§ 2183, 2184.)

Illustrations. (1) A gambling implement, obtained by a search illegally made on the defendant's premises. Testimony by a coroner, who has made an unauthorized autopsy.

(2) A document required by tax-law to be stamped, but lacking the stamp.

Cross-references. (1) For the rule excluding *documents* obtained in consequence of a breach of the *privilege against self-crimination*, see Rule 203, Art. 5 (*post*, § 1746).

(2) For the rule as to *documents* illegally removed, see also Rule 196 (*ante*, § 1654).

¹ All Courts seem to recognize this rule, but it is not always enforced. The discretionary form, as above, seems the safest. Some statutes improperly give the option to the custodian himself.

TITLE II: RULES OF OPTIONAL EXCLUSION (PRIVILEGE)

SUB - TITLE I:

TESTIMONIAL DUTY AND PRIVILEGE IN GENERAL

RULE 198. *General Principle.* Inasmuch as every member
1660 of the community has a general and public duty to attend in
court and to disclose all matters known to him, to the end
that truth may be established in litigation, any rule of
privilege herein recognized as paramount to testimonial duty
is an exception to the general rule. — (W. § 2192.)

ART. 1. *Scope of Duty as to Attendance and Disclosure.*
1661 The testimonial duty is

1. to *attend* court as a witness, i. e. for the purpose of
testifying; and
2. to *disclose*, by any feasible mode of communication, the
evidential facts in the witness' control.

A privilege derogating from the first part of the duty is a
Viatoral Privilege.

A privilege derogating from the second part of the duty is
Testimonial Privilege.

ART. 2. *Scope of Duty as to Documents, Chattels, etc.* The
1662 duty as to disclosure includes all matters within the control
of the witness and capable of communication or exhibition;
in particular,

1. documents;
2. chattels;
3. premises;
4. corporal features. — (W. §§ 2193, 2194.)

ART. 3. *Process to Enforce Duty; Subpœna.* The duty is
1663 enforceable by summons notifying a person to attend and
give testimony. — (W. §§ 2199, 2200.)



1664 *Par. (a).* The summons must be in *writing (subpœna)*, unless the witness is already in court.

1665 *Par. (b).* The service must be
 (1) by leaving a *copy* with the person
 (2) or, [by reading or showing the original to him] in the manner prescribed for service of other process.

1666 *Par. (c).* The service must be made a reasonable time before the day specified for attendance.

1667 *Par. (d).* The production into court of *documents*, if desired, must be stated in the summons, with such precision that the witness can conveniently find and bring them.

But the production into court must comprise all the described documents; and any question of irrelevancy or privilege will be ruled upon by the judge at the time of any offer to use them in evidence.

Cross-reference. (1) For the privilege as to documents *inconvenient to remove* see Rule 200, Art. 3 (*post*, § 1691).

(2) For the mode of obtaining *discovery* of documents *before trial*, see Rule 161 Art. 4 (*ante*, § 1335).

1669 *Par. (e).* The duty as to production of documents comprises documents within the person's control.

1670 ART. 4. *Constitutional Right to Process.* A party defendant in a criminal case has a right to such process, and cannot, under the Constitution, be deprived of it by law. — (W. § 2191.)

1671 ART. 5. *Officers having power to Compel, etc.* The rules concerning the following matters are not included in this Code: — (W. § 2195.)

The *classes* of judicial *officers* who have power to *compel* performance of testimonial duty;

The witness' *immunity from other legal process* while performing testimonial duty;

The party's *right of civil action* against a person who fails to perform testimonial duty.

1672 ART. 6. *Kinds of Privilege.* There are two kinds of privilege, *Viatorial* and *Testimonial*.

The *viatorial* privilege exempts the person from *travelling to attend* before a court or deputy judicial officer, and allows him to give his testimony in his place of residence or in his house, before an officer appointed to take it.

The *testimonial* privilege is of two classes. The first class comprises privileged *topics*, *i. e.* facts, or subjects of fact, upon which the person concerned is privileged not to make disclosure. The second class comprises privileged *communications*, *i. e.* a communication made between particular persons, which one or both of them is privileged not to disclose. — (W. § 2197.)

ART. 7. *Privilege Personal to Witness.* Since a privilege
1673 is designed to protect some interest of the class of persons represented in the witness, by giving an option not to disclose, the privilege is personal to the witness. — (W. § 2196.)

Therefore,

1674 *Par. (a).* The *claim* of privilege can be made solely by the person entitled to it, and not by a party to the cause as such.

1675 *Par. (b).* A judicial ruling, erroneously made, can be *excepted to* by a party ruled against

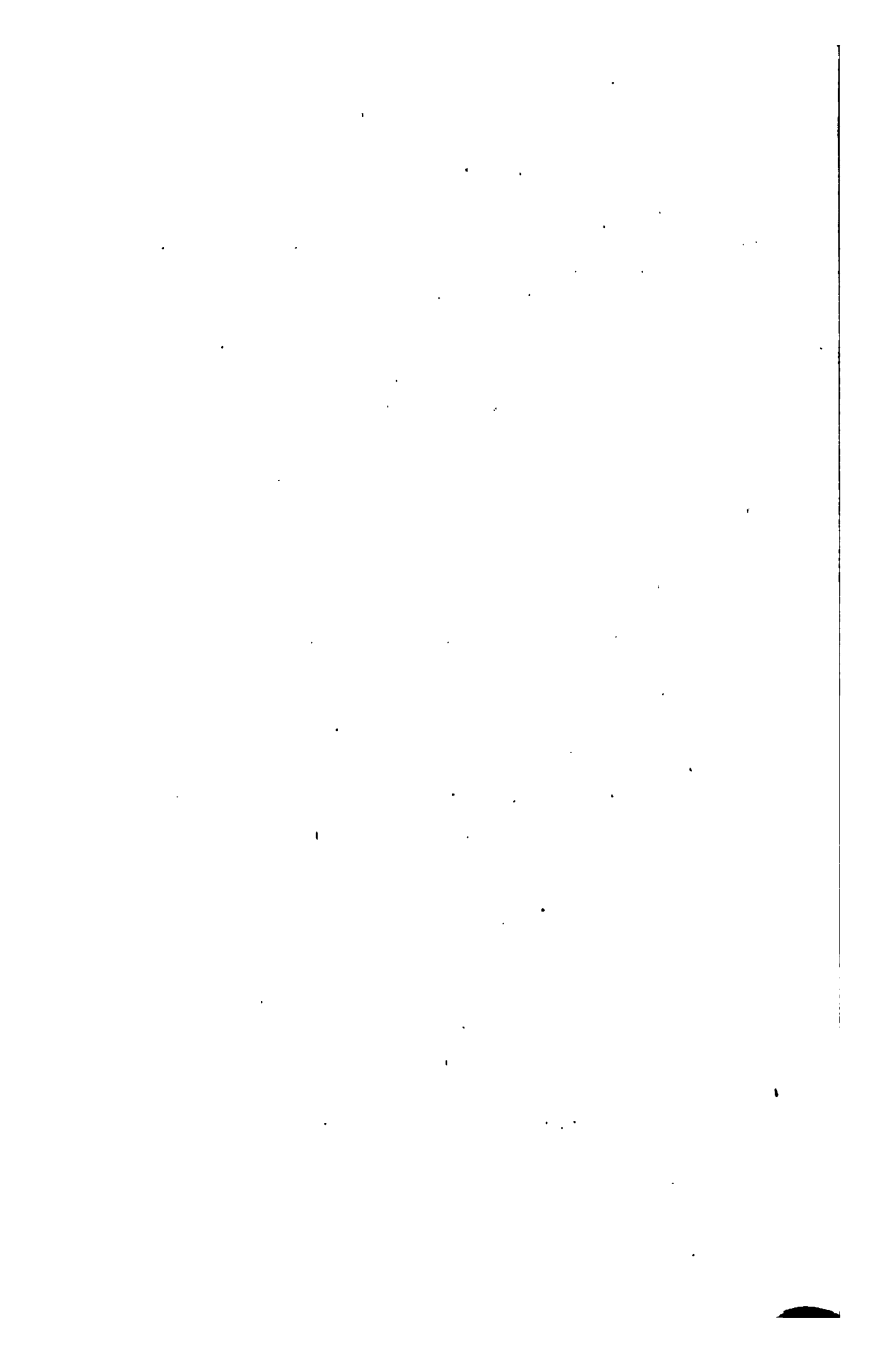
(1) if it *affirms* the privilege and thus excludes admissible evidence useful to the party;

(2) [but not] if it *denies* the privilege and thus receives admissible evidence contrary only to the rights of the witness.¹

ART. 8. *Privilege may be Waived.* Every privilege, being
1676 an option conceded to a particular class of persons to decline to disclose or to attend, and not an inherent defect in the evidence, may be waived, *i. e.* not claimed. Therefore when the privileged person exercises his option to attend or to disclose, no further objection lies to the admission of his testimony, by reason of the rules in this present Part III of this Book.²

¹ The clause in brackets represents the correct rule; but some Courts deny it in theory, and most ignore it in practice.

² This is usually ignored by Courts, especially in the rules for privileged communications.



Par. (a). This privilege of non-attendance at court leaves the person still liable to the duty to *testify by deposition* given at the place of his residence.

ART. 1. *Illness.* Serious illness of self or family may
1686 excuse from attendance. — (W. § 2205.)

ART. 2. *Personal Status.* The following classes of persons
1687 are privileged from attendance :

1688 *Par. (a). Domestic Officials.* — (W. §§ 2371-2373.)

(1) The Chief *Executive*;

[(2) A *judge* of a superior court;]

[(3) A *custodian* of public records, for the purpose of bringing the records, and so far as the records themselves are irremovable under Rule 196 (*ante*, § 1654).]

Cross-reference. For the privilege *not to disclose* official matters by testifying at all, see Rule 210 (*post*, § 1842).

1689 *Par. (b). Foreign Officials.* — (W. § 2372.)

(1) An ambassador or minister;

[(2) A consul.]

1690 *Par. (c). Private persons.* — (W. § 2206.)

[(1) A practising physician.]¹

[(2) A woman.]¹

ART. 3. *Inconvenience (Distance, etc.).* The following
1691 circumstances privilege from attendance :

[*Par. (a).* Risk of serious and disproportionate injury to livelihood

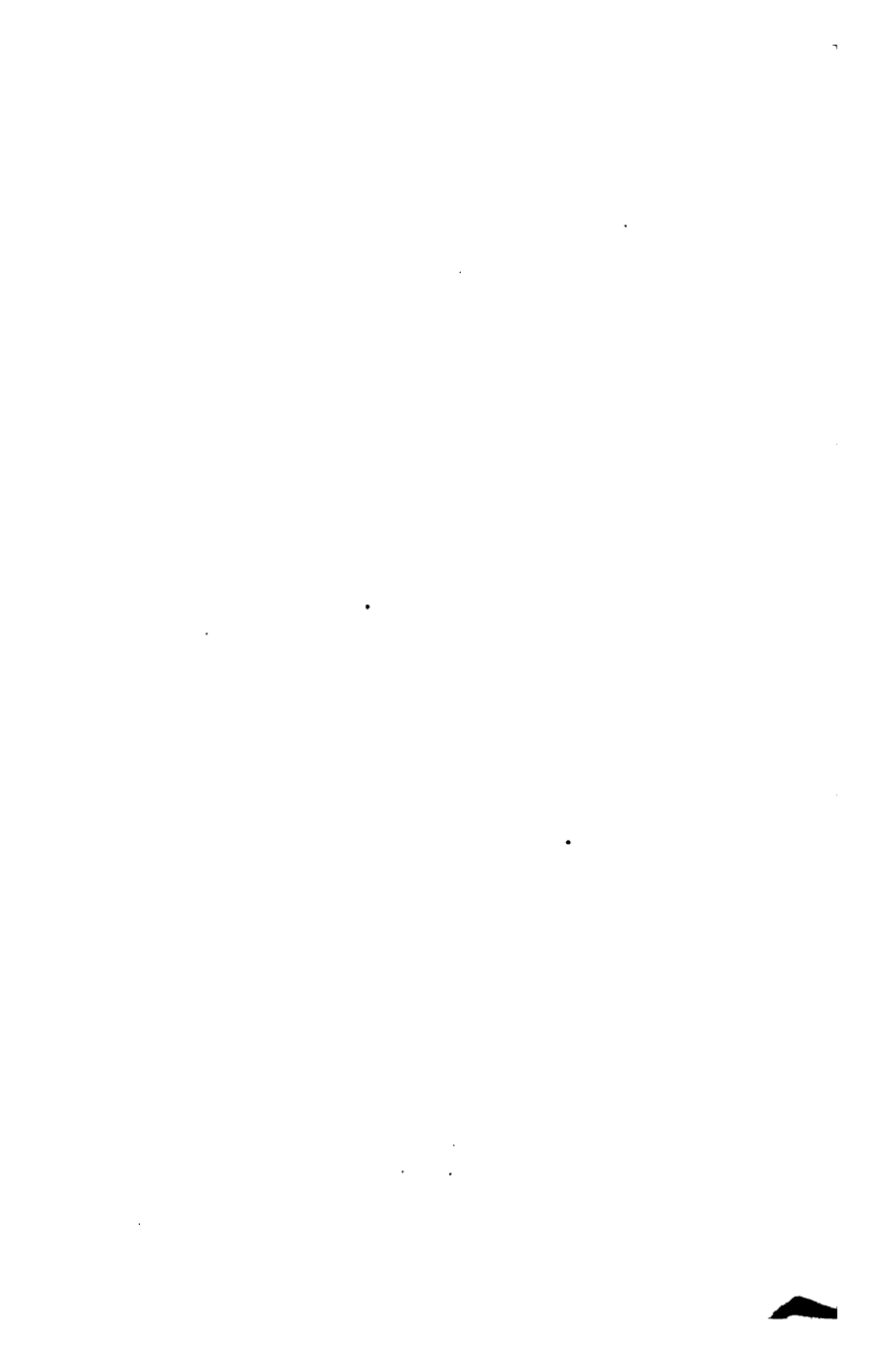
(1) either by personal absence therefrom,

(2) or by removal of commercial books.]² — (W. §§ 2205, 2206.)

Par. (b). Residence at a distance from the place of

¹ A few States recognize these privileges, but not wisely.

² Sometimes such a rule has been recognized; but the case ought to be extreme and rare.



1692 trial [[such as to impose disproportionate hardship;]]
[namely, out of the county.]¹ — (W. § 2207.)

SUB-TITLE III: TESTIMONIAL PRIVILEGE

TOPIC A: PRIVILEGED TOPICS

RULE 201. *Sundry Privileged Topics.* For miscellaneous
1693 topics privileged not to be disclosed, the following rules
apply:

ART. 1. *Irrelevant Matters.* There is no privilege for
1694 matters irrelevant or otherwise inadmissible.² — (W. § 2210.)

Distinguish (1) the lack of *power* in a deposition-officer to
compel answers and therefore to rule upon relevancy;

(2) the party's right to refuse *discovery* before trial on im-
material matters, under Rule 161, Art. 3 (*ante*, § 1332).

ART. 2. *Documents of Title.* There is no privilege for
1695 documents of title;³ except where a person holding a lien
on a document might substantially lose the benefit of his
lien if compelled to produce the document at the instance of
the lienee. — (W. § 2211.)

ART. 3. *Trade Secrets.* Any fact important to the existence
1696 of a particular industry or business, and habitually kept in
the private knowledge of the persons occupied therein, is
privileged; unless the trial judge deems

(1) that the privilege if conceded to a party opponent in
a suit based on fraudulent competition will not be *bona fide*
exercised and may serve to conceal fraud;

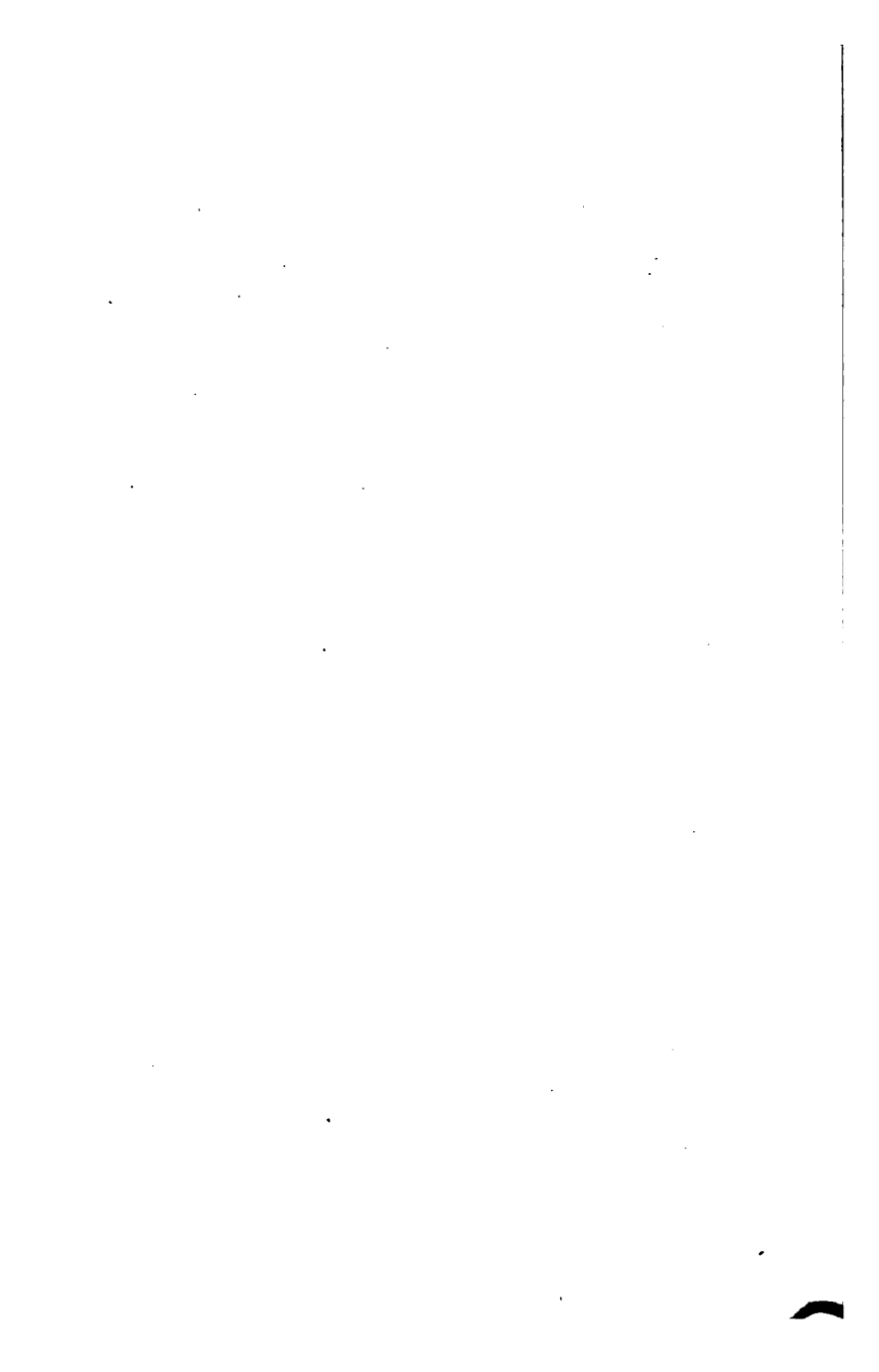
(2) or, in any other case, that the privilege, if conceded,
will substantially prevent the ascertainment of the truth,
and may thereby cause more harm than the disclosure
would cause.⁴ — (W. § 2212.)

¹ A statute always fixes a specific limit. But such a rule
works arbitrarily, and ought to have flexibility, as provided
in the double-bracketed clause.

² A few Codes do concede such a privilege, but this is un-
sound both theoretically and practically.

³ But in England there was.

⁴ Some such privilege, with unfixed limits, is recognized
in all courts.



1697 [Par. (a). The trial judge may in any case prescribe a disclosure limited to himself or his appointee.]¹

1698 ART. 4. *Official Secrets.* A fact confidentially preserved in the knowledge of officers of State, and for the public welfare necessarily kept secret, is privileged; subject to the qualifications of Rule 210 (*post*, § 1842.)² — (W. § 2213.)

1699 ART. 5. *Theological Belief.* A person's belief in matters of theology is privileged. — (W. § 2214.)

Cross-reference. For the mode of ascertaining theological belief for the purpose of administering an *oath*, see Rule 157, Art. 3 (*ante*, § 1292).

1700 ART. 6. *Political Vote.* The tenor of a person's vote lawfully cast at any government election is privileged. — (W. § 2215.)

Distinguish the privilege against *self-crimination*, Rule 203 (*post*, § 1730), which would protect the fact of illegal voting from *self-disclosure*.

1701 [ART. 7. *Disgrace or Infamy.* A fact involving public disgrace or infamy, and not material to the issue, though relevant, is privileged.]³ — (W. §§ 984, 986, 987, 2216.)

Illustration. Whether a person has stolen from his employer is a fact of crimination; but whether he has been convicted of such stealing is a fact of infamy.

Cross-reference. For the *trial Court's discretion* in checking cross-examination to disgracing facts (which in most States takes the place of this privilege), see Rule 105, Art. 2 (*ante*, § 552).

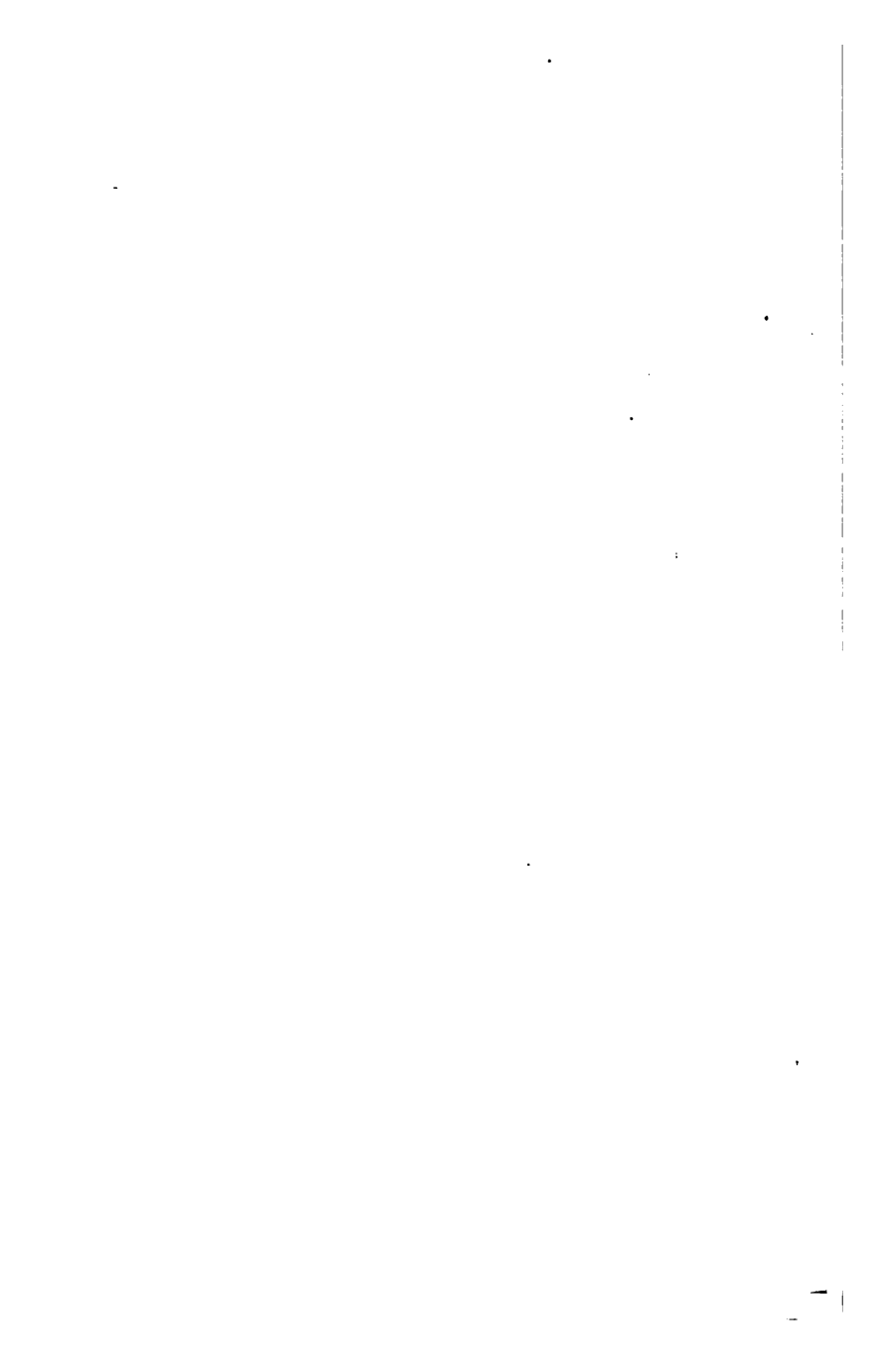
1702 ART. 8. *Party-Opponent in Civil Suit.* The party-opponent in a civil case is not, as such, privileged to withhold any facts.⁴ — (W. §§ 2217, 2218.)

¹ This paragraph would remove much of the risk of harm done by refusing such a privilege.

² The distinction between a *topic* and a *communication* is here difficult to make and is seldom made; hence the rules can best be stated in one place.

³ This privilege may be surviving in some States.

⁴ This is everywhere covered by statute.



Distinguish the opponent's liability to make discovery before trial, under Rule 161, Art. 3 (*ante*, § 1332), for which the rules are variant; at trial no privilege would exist, though before trial the discovery might not be demandable.

1703 *Par. (a).* This rule includes the *production of documents*, upon reasonable notice by subpoena *duces tecum*, or on motion, or otherwise as prescribed by rules of Court. — (W. § 2219.)

1704 *Par. (b).* This rule includes the *inspection of the opponent's body*, by the jury or by witnesses, under conditions prescribed by order of the trial judge or by standing rules of Court, and in all issues where some fact concerning the person's body is relevant; — (W. § 2220) in particular, in an issue

(1) of inheritance, *de ventre inspiciendo*;

(2) of divorce, to ascertain *impotency*;

(3) of insanity, to ascertain *mental condition*;

[(4) of crime, of inheritance, of insurance, or otherwise, to ascertain the *identity* of a buried body;]

[(5) of personal injuries, in crime or tort, to ascertain the nature of the injuries.]¹

Distinguish the privilege of an *accused* not to disclose criminal facts, under Rule 203, Art. 2 (*post*, § 1737).

1705 [*Par. (c).* This rule includes the *inspection of chattels or premises* in the opponent's control, by the jury or by witnesses, under conditions prescribed by order of the trial judge or by standing rules of Court, and in all issues where some fact concerning such chattels or premises is relevant.]² — (W. § 2221.)

1706 [[*Par. (d).* This rule also includes the *doing of any simple act*, not dangerous or excessively inconvenient, which would be needed or useful

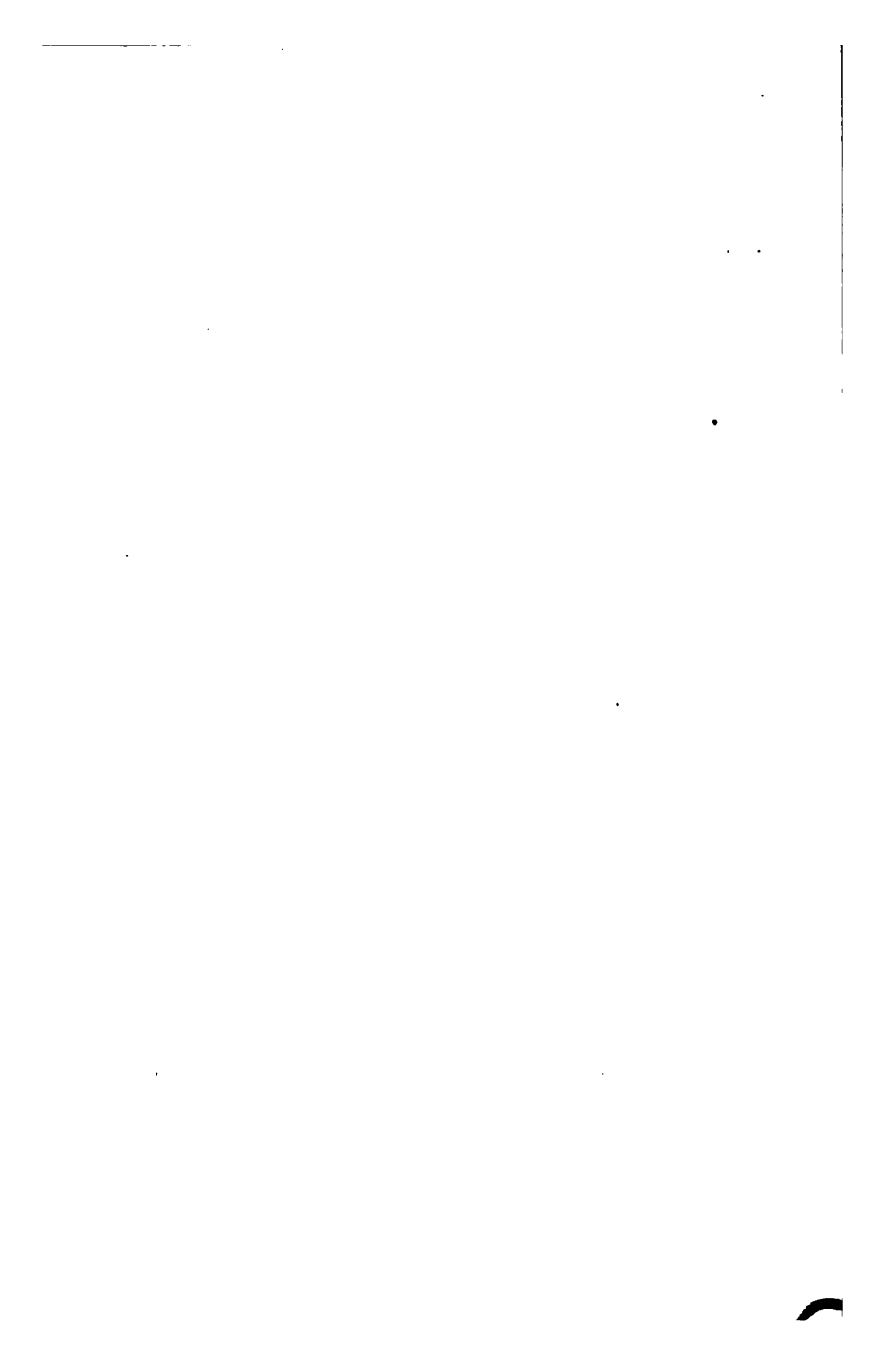
(1) for making one of the foregoing disclosures;

(2) for furnishing some other evidential fact.]]³

¹ Some Courts still concede a privilege here.

² In some States there is common law authority for a privilege here.

³ This is probably not yet law, but might well be.



Illustrations. (1) Supplying a key to a door, or running the machinery of a mine.

(2) Writing a sample signature.

ART. 9. *Civil Liability.* A fact involving a civil liability
1707 on a claim other than the one in suit at bar is not privileged.
— (W. § 2223.)

Distinguish the foregoing Art. 8, which denies to the party-opponent in the suit as such any privilege to withhold the facts relating to that liability in suit; the present Article further denies any privilege whether to party-opponent or to ordinary witness, for facts affecting any other civil liability whatever. The privilege denied in this Article never existed; the privilege denied in Art. 8 existed, but is everywhere abolished; the privilege of Rule 11 (crimination) still exists.

RULE 202. *Anti-Marital Facts.* A fact against the interest
1710 of the witness' husband or wife is privileged; subject to the following exceptions and distinctions: — (W. §§ 2227, 2228.)

(*Reason and Policy.* This privilege rests upon sentimental grounds, — the sentiment of repugnance to forcing a husband or wife to become the means of injuring the other; there is a double harshness in making the one do injury to the other, and the other suffer injury from the one. Nevertheless, such feelings frequently do not exist, i. e. where a mutual hostility has already preceded litigation. Moreover, where they do exist, the administration of justice cannot be carried on without some harshness to natural feelings. Hence many deny the propriety of recognizing this privilege.)

ART. 1. *Valid Subsisting Marriage; Death or Divorce.*
1711 The privilege applies only as between the spouses of a valid subsisting marriage. — (W. §§ 2230, 2231.)

Illustration. On a charge of bigamy in first marrying A and then B, the defendant disputing the second marriage, the privilege covers A's testimony, when called for the prosecution, but not B's.

Par. (a). The privilege does [not] apply where the
1712 marriage has been terminated by *death* or by *divorce*.¹ —
(W. § 2237.)

ART. 2. *Form of Testimony.* The privilege applies to any
1713 form of testimonial utterance or act of one spouse offered

¹ Here a few Courts recognize the privilege.

§§ 1714-1718 PRIVILEGE: ANTI-MARITAL FACTS

against the other, whether by deposition, by admission, by hearsay exception, by production of documents, or otherwise. — (W. §§ 2232, 2233.)

Par. (a). But the privilege does not cover

1714 (1) admissions made by a spouse acting as *agent*, *grantor*, etc., according to Rule 121, Arts 2-5 (*ante*, §§ 687-692);

(2) admissions made by a spouse in *assenting*, by *silence*, to statements made by the other spouse, according to Rule 119, Art. 2 (*ante*, § 668).

ART. 3. *Subject of Testimony*. The privilege covers facts
1715 disfavoring the legal interests of the other spouse in the suit at bar, and no others.¹ — (W. §§ 2234, 2235.)

Illustrations. (1) Action by an indorsee against an acceptor; plea, a forged alteration by the drawer; the wife of the drawer is admissible to testify to the alteration.

(2) Replevin by a wife against the husband's vendee; the husband being warrantor, the privilege covers the wife's testimony for herself against the vendee, as well as the husband's testimony for the vendee.

In particular,

1716 Par. (a). In a suit involving *adultery*, the testimony of the spouse of the person, not a party, with whom a party's adultery is charged, is [not] privileged.²

1717 Par. (b). The privilege covers the testimony of the wife of a *co-defendant on trial* in the same proceeding; but not that of the wife of a co-defendant whose interest has been removed by acquittal or otherwise or of a co-indictee separately tried or of an accomplice separately indicted.³ — (W. § 2236.)

ART. 4. *Issues*. The privilege does not apply in the following classes of issues:

¹ There is here much variance in applying this rule. The limitation to *legal* interests is not universally observed.

² Courts are here in opposition.

³ These distinctions should correspond to those of Rule 84, Art. 1 (*ante*, § 389).



§§ 1719-1725 PRIVILEGE: ANTI-MARITAL FACTS

1719 [Par. (a). In all *civil* issues.]¹ — (W. § 2245.)

1720 [Par. (b). In all *criminal* issues.]² — (W. § 2245.)

[Par. (c). In all issues as to the wife's *separate estate*.]³ —
1721 (W. § 2240.)

[Par. (d). In issues where the one has acted as *agent*
1722 for the other.]⁴ — (W. § 2240.)

Par. (e). In issues involving a tort by one against the
1723 other or a crime based on a moral wrong by one against
the other: ⁵ — (W. § 2239.)

in particular, in issues of

(1) *Corporal injury*;

[(2) *Desertion*, failure to support;]⁶

[(3) *Adultery*, incest, and bigamy;]⁷

[(4) *Divorce* on any ground.]⁸

ART. 5. *Waiver of the Privilege*. The privilege belongs
1724 both to the spouse called as witness and to the party-spouse
disfavored by the testimony; therefore a waiver of the privilege
must be made by both.⁹ — (W. § 2241.)

Cross-reference. That this privilege, like others, is essentially
waivable has been already declared in Rule 198, Art. 8 (*ante*,
§ 1676).

Par. (a). The waiver may be
1725 (1) *expressed* in words; or
(2) *implied* in conduct, as by a spouse calling the
spouse for direct examination [or by the party-spouse
taking the stand.]¹⁰ — (W. § 2242.)

¹ Several statutes have gone this far.

² A few statutes have taken this step.

³ Many statutes so provide.

⁴ This is a frequent statute.

⁵ This is a broad re-statement of the common-law exception
and a frequent statutory exception, but is somewhat more
generalized than any existing law.

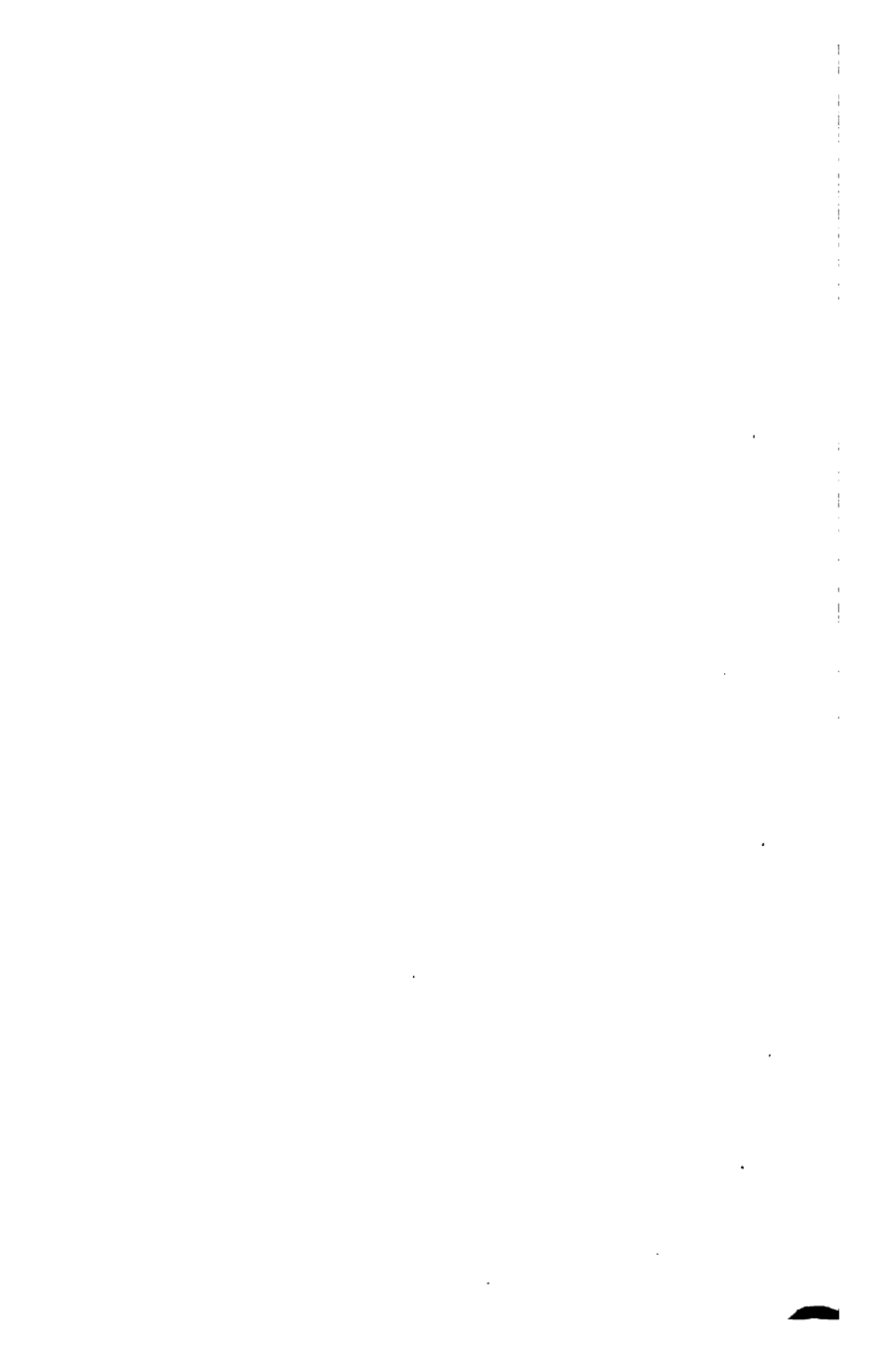
⁶ A few statutes and decisions do this.

⁷ Here there are variant rules.

⁸ Statutes frequently make express provision.

⁹ A few rulings take a different view.

¹⁰ Some Codes expressly so provide.



ART. 6. *Inference from Claim of Privilege.* No inference
1726 ought to be drawn, as to the facts not disclosed, when a claim
of privilege is made. — (W. § 2243.)

Distinguish the inference from *not calling* a qualified witness,
under Rule 118, Art. 6 (*ante*, § 658); if the wife were dis-
qualified to testify *for* the husband, his failure to call her
would on that ground also not be open to inference, irrespec-
tive of his privilege not to let her testify *against* him.

RULE 203. *Self-Criminating Facts.* A fact tending to
1730 incriminate the person himself is privileged;

subject to the following distinctions and qualifications:
— (W. §§ 2251, 2252.)

(*Reason and Policy.* The policy of the privilege is in part
to protect guilty persons because of a sentimental respect
for their feelings at being obliged to become the means of their
own conviction. But this alone would be ill-judged and in-
sufficient. The substantial basis of policy is to prevent the
officers of prosecution from relying habitually on the ac-
cused's compulsory confession as a chief source of proof, and
thus to induce a thorough search for evidence and to avoid
the oppressive and brutal abuses of power which are likely
to attend such compulsion.)

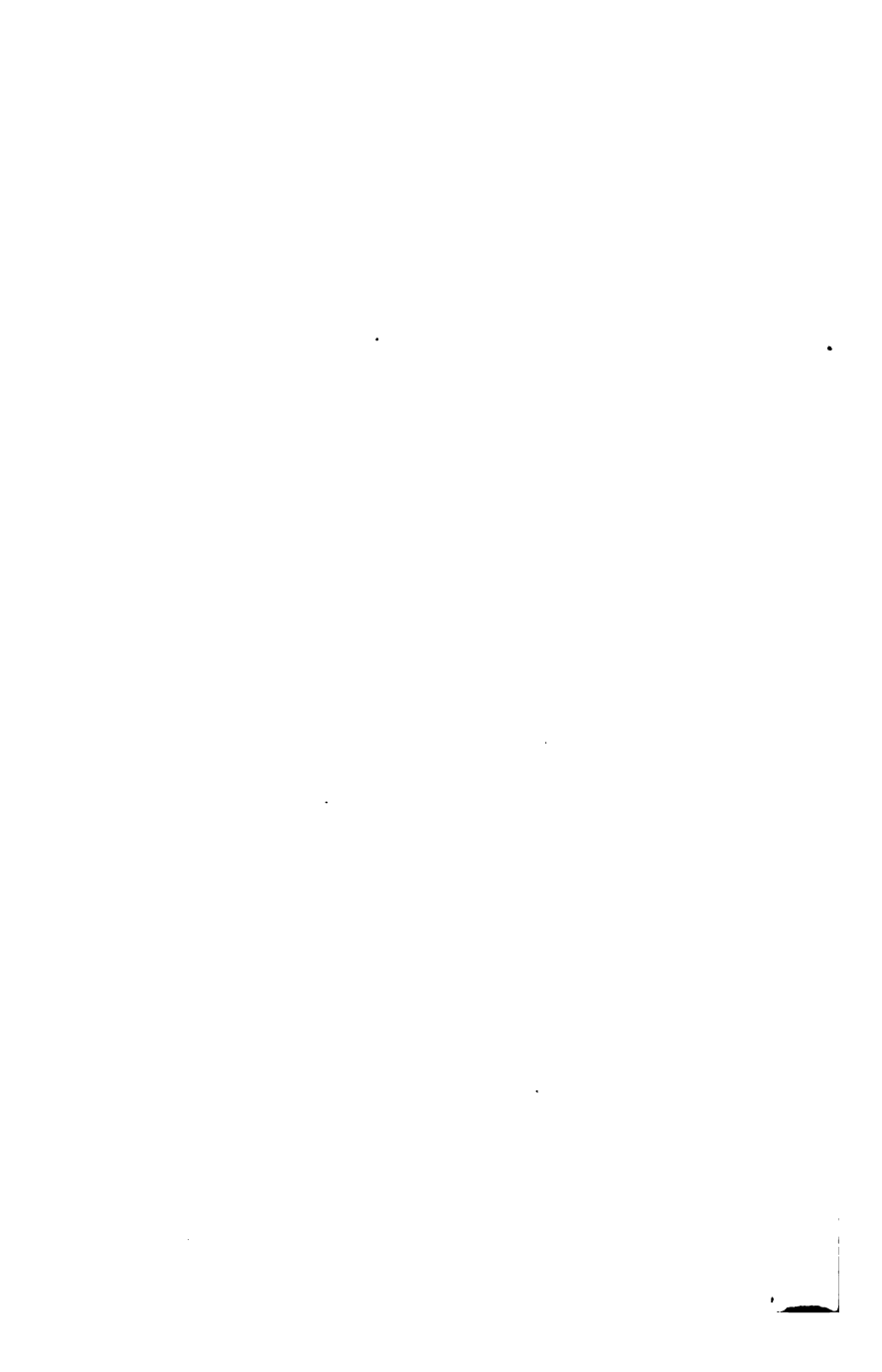
ART. 1. *Proceedings and Persons.* The privilege applies
1731 to

- (1) all kinds of *proceedings* of investigation, whether before
a petty jury, a grand jury, the Legislature, a deposition-
officer, a coroner, or otherwise; and to
- (2) all kinds of *issues*, whether civil or criminal; and
- (3) all kinds of *persons*, whether an ordinary witness or a
party-witness. — (W. § 2252.)

ART. 2. *Kind of Facts protected from Disclosure.* The
1732 privilege covers facts involving liability of the person to repres-
sive punishment by the State, as contrasted with liability
to a civil claim for redress. — (W. §§ 2254.)

Illustrations. (1) A forfeiture of office, as a penalty for
treason or peculation, is within the privilege; but not a
forfeiture of tenancy for breach of condition in a deed.

(2) A penalty payable to the government treasury for
the offence of rate-discrimination is within the privilege;
but not a liability in treble damages to the shipper for such
discrimination.



1733 *Par. (a).* A fact criminating the person by law of a *foreign State* is not as such privileged, [unless there is ground for believing that the prosecution is instituted principally for the purpose of using the answer as evidence in that State.]¹ — (W. § 2258.)

1734 *Par. (b).* A fact criminating *another person* is not as such privileged. — (W. § 2259.)

Illustration. An officer of a corporation has no privilege as to facts criminating the corporation, unless they also criminate himself, as where he is asked to produce corporate books of entries made by himself.

1735 *Par. (c).* A fact criminating a *corporation* is [not] privileged for the corporation.² — (W. § 2259.)

1736 *Par. (d).* A fact tending to criminate, in the sense of the privilege, is

(1) a fact forming a separate but essential *part of a criminal act* by the person asked; — (W. § 2260.)

[(2) or, a fact *capable of furnishing* to prosecuting officers a *clue* to criminating evidence against the person asked.]³ — (W. § 2261.)

Illustrations. (1) On a trial for keeping an illegal gaming house, a witness to the gambling is asked, 'Tell who took part in the game, not naming yourself.' This is not privileged, under Clause (1), because the answer need not furnish any fact involving a criminal act or part of an act by the witness. But it is privileged, under Clause (2), because the disclosure of the name of Doe as a person who took part would enable the prosecution to find Doe, and Doe could then testify that the present witness took part (if he did), on a subsequent trial of the present witness for illegal gaming.

(2) On a charge of forgery of a bank-note, a witness to the defendant's alibi is asked whether he had ever had the bank-note in his possession; this may be privileged, because the offence of possessing a counterfeit note with intent to utter may be otherwise evidenced as to the facts of (a) its counterfeit nature, (b) an intent to utter, and thus the remaining element of the crime, (c) possession, would be furnished by the answer sought from the witness.

¹ There are here opposed rulings. The bracketed clause is a compromise that may be law in some courts.

² There is little authority yet.

³ This clause is accepted as law in almost all States, though it is unsound.



ART. 3. *Form of Disclosure protected.* The privilege
1737 covers any form of testimonial disclosure, i. e. a disclosure
sought to be obtained from the person through some act of
volition on his part, under compulsory legal process against
him as a witness. — (W. § 2263.)

In particular:

1738 *Par. (a).* The person's *production* of a *document* or of a
chattel upon subpoena or motion is within the privilege;
but not the obtaining of a document or a chattel from
the person's possession by an officer searching or seizing
under legal process.¹ — (W. § 2264.)

Illustrations. (1) The defendant was arrested on a warrant for
assault with intent to kill; on resisting, he was confined and
searched, and a pistol was found by the officer. The obtaining
of this pistol is not within the privilege.

(2) Charge of evading customs dues by fraudulent invoices;
on a motion that the defendant be ordered to produce the in-
voices for inspection in court, the privilege applies.

1739 *Par. (b).* The person's *bodily condition* is within the
privilege, in so far as he is asked to disclose it by his own
volition for the sole purpose of furnishing evidence;
but the privilege does not prevent its disclosure by fore-
ible handling reasonably done by officers of the law.² — (W.
§ 2265.)

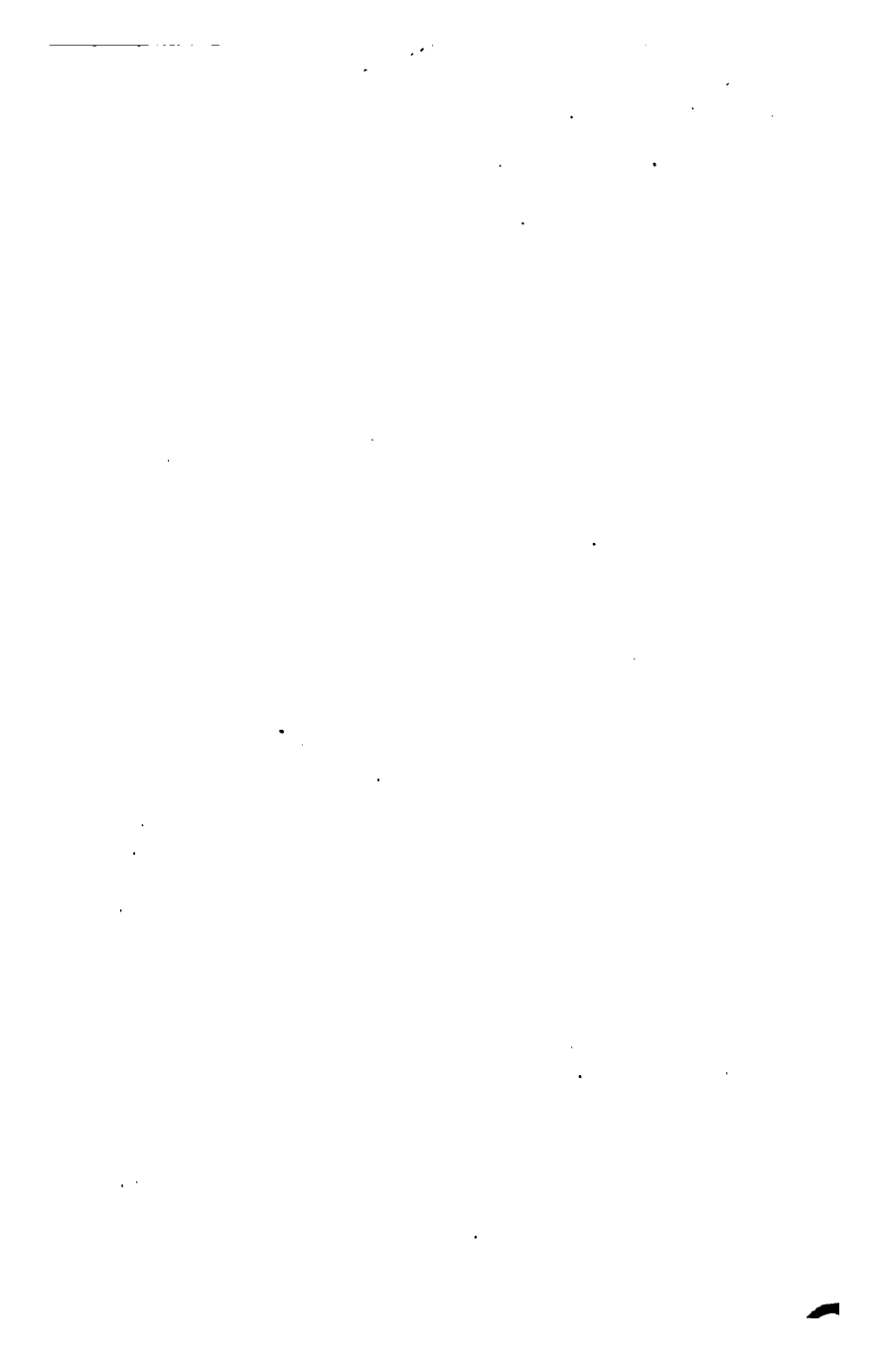
Illustrations. (1) To require a person to use his voice for
identification, or to write a sample of handwriting, is within
the privilege.

(2) For an officer to take off a person's boot and to fit
it into boot-tracks is not within the privilege.

Distinction. The voluntary *waiver* of the privilege, under
Art. 6 (*post*, § 1749), may suffice, here as elsewhere. Most
cases where an accused is told to stand up in court for identi-
fication, or to take off his coat preliminary to a measure-
ment or inspection, should be treated as waivers of the privi-
lege, made voluntarily by the accused to save the inconven-
ience of bringing the witness nearer or of being handled by
the officers, — alternatives which otherwise could be em-
ployed with like result to the accused.

¹ At one time this second clause was denied in a few juris-
dictions, but now no longer anywhere, presumably.

² This detail of the rule is hard to phrase, and no generally
accepted phrasing is in vogue.



1740 ART. 4. *Mode of Claiming the Privilege.* The privilege, being an option to refuse disclosure of a fact otherwise admissible (Rule 198, *ante*, § 1660), must be claimed by the witness, in so far as any effect is desired to be given to it as a rule of evidence; but the judge, as the enforcer of all rules of evidence (Rule 229, *post*, § 2100), determines its applicability; subject to the following details and qualifications: — (W. § 2268.)

1741 *Par. (a).* In so far as the fact desired to be asked about is not open to objection on other grounds of admissibility dealt with in Parts I and II of this Book, the person may be *interrogated*;
except when he is the accused in a criminal case. — (W. § 2268.)

1742 *Par. (b).* The judge may but need not *notify* the witness that the fact asked about is subject to a privilege not to answer.¹ — (W. § 2269.)

1743 *Par. (c).* The *witness alone*, and not the party nor the party's counsel as such, may make the claim, pursuant to Rule 198, Art. 7 (*ante*, § 1673). — (W. § 2270.)

1744 *Par. (d).* An *erroneous ruling* sanctioning the privilege may be excepted to by a party to the suit; but not an erroneous ruling denying the privilege. — (W. § 2270.)

Cross-reference. For this general principle as applicable to all privileges, see Rule 198, Art. 7 (*ante*, § 1673).

1745 *Par. (e).* The judge determines whether the fact claimed as privileged is one which would tend to criminate, and he is to sanction the claim if under all the circumstances of the case any direct and true answer may with reasonable possibility tend to criminate.² — (W. § 2271.)

1746 ART. 5. *Effect of Claiming the Privilege.* No inference as to the truth of a criminating fact ought to be drawn, by judge, jury, or counsel, from the circumstance

¹ The practice has differed; but no rule obliges the judge to give notice.

² This phrasing consolidates the orthodox phrasings of Justices Cockburn, Marshall, and Mitchell.

.

.

.

.

.

.

that a claim of privilege is made by an ordinary witness or by a party-witness
or that an accused party fails to testify as witness for himself.¹ — (W. § 2272.)

1747 *Par. (a).* Where counsel has violated this rule by commenting to the jury upon an accused's failure to testify, a new trial is [not] necessarily to be granted after a verdict of guilt.² — (W. § 2272, n. 5.)

1748 *Par. (b).* The rule does not apply to any inferences that may be permissible, under Rule 118, Art. 6 (*ante*. § 658), from a party's failure

(1) to *cause to be introduced* a witness or a document, or other evidence;

(2) to deny or explain, by his *own testimony*, the evidence against him, after he has waived the privilege by taking the stand in his own behalf. — (W. § 2273.)

1749 ART. 6. *Waiver of the Privilege.* The privilege may be waived by voluntary abandonment of it made in advance of the time when it could otherwise be claimed.

1750 *Par. (a).* A *contract*, made before trial, not to claim the privilege, takes away the privilege. — (W. § 2275.)

1751 *Par. (b).* An *ordinary witness*, by testifying, does not waive the privilege;

except that if he testifies to any part of a matter known to him to be criminating, he may not afterwards during that trial claim the privilege for any other part of the same matter.³ — (W. § 2276.)

Illustration. In an action by a parent for seduction and loss of service, the plaintiff's daughter testifies to the defendant's intercourse. On cross-examination, questions as to her in-

¹ A few statutes or Courts require an instruction to the jury; but this is futile.

² A few States by statute omit the "not"; but this is an extreme and fatuous measure. Suspending the prosecuting attorney would soon secure habitual obedience.

³ This is the rule everywhere except in England and one or two States. But the phrasing of the excepted clause differs widely. The essential thing is that the rule for an ordinary witness differs from the rule for an accused.



tercourse with other men about the same time are not within the privilege.

1752

Par. (c). An accused in a criminal case, by testifying at all, waives the privilege

[(1) as to all matters whatever, including facts merely affecting his character as a credible witness;]¹

[(2) as to all matters relevant to any part of the issues, but not as to facts merely affecting his credibility as a witness;]²

[(3) like any other witness;]³

[(4) as to all matters already dealt with in his direct examination;]⁴

[(5) as to the criminal act charged, and nothing else.]⁵

— (W. § 2276.)

Illustrations. (1) On a charge of homicide in a brawl on June 17, the accused takes the stand and testifies that he stabbed in self-defence. On cross-examination, he is asked as to his having assaulted the deceased on June 15, with a view to showing malice and a plan to kill. The privilege would not here apply, under Clause 1 or Clause 2; but it might apply under Clause 3 and Clause 4, and it certainly would apply under Clause 5.

(2) On the same trial, the accused is cross-examined as to having kept a gaming-house in that town for some months past, with a view to impeaching his moral credit as a witness. The privilege would not apply under Clause 1, nor possibly under Clause 4; but it would apply under Clause 2.

Distinctions. (1) The rule as to the admissibility of *particular misconduct affecting moral character* as a witness on cross-examination (Rule 105, Art. 2, *ante*, § 552), may here be involved. Under that rule, it is constantly ruled that certain discreditable facts may be asked about for that purpose; but a ruling to that effect is not necessarily a ruling that the witness could not claim his privilege; the objection should be specifically put on that ground.

(2) The rule of many States confining the scope of the cross-examination to *topics dealt with in the direct examination* (Rule 164, Art. 4, *ante*, § 1376), will usually be applied to allow a liberal scope to the questions asked of an accused;

¹ One or two States accept this.

² This is the soundest rule, accepted in most States.

³ This is a frequent statutory form, not clear in scope.

⁴ This is an occasional statutory form, and is originally directed only to cover Rule 164, Art. 4 (*ante*, § 1376).

⁵ A few statutes so enact.

and a ruling to that effect is not always distinguishable from a ruling under the present rule as to the waiver of privilege.

1753 **ART. 7. Expurgation of Criminality, by Pardon, Legislative Immunity, or otherwise.** Where the criminality of an act is eliminated, so that the answer to a question about it would cease to involve a criminalizing fact, the privilege ceases, and the answer is compellable.

Such elimination of criminality may take place

(1) by *conviction*, by *acquittal*, or by other jeopardy discharging from further liability to prosecution. — (W. § 2279.)

(2) by *lapse of time*, barring prosecution.

(3) by *executive pardon*. — (W. § 2280.)

(4) by *legislative amnesty or immunity*.

1754 **Par. (a).** The privilege ceases wherever a statute provides that if a person makes disclosure before an officer empowered to take testimony

(1) the person shall thereafter be *exempt from prosecution* for any criminal fact to which the disclosure relates;¹ — (W. § 2281.)

[(2) or, the *testimony* thus given shall *not be used against* the person in any criminal proceeding.]² — (W. § 2282.)

1755 **[Par. (b).** In order that a disclosure thus made may secure *immunity* from prosecution, there must be

(1) an explicit claim of the privilege by the witness;

(2) and, a ruling of the officer directing answer; but there need not be

(3) a service of subpoena;

(4) nor, an imposition of the oath.]³ — (W. § 2281a.)

¹ This is now universally conceded.

² This is also sound, on the theory of Art. 2, Par. (d) (*ante*, § 1736), but is probably no longer law except in one or two jurisdictions.

³ The subject of this Paragraph has as yet been little considered by the Courts, and the above phrasing is tentative only.

TOPIC B: PRIVILEGED COMMUNICATIONS

SUB-TOPIC I: CONFIDENTIAL COMMUNICATIONS IN GENERAL

RULE 204. *General Principle.* [A privilege exists, for
1760 persons making or receiving a communication, not to disclose
the communication, whenever

(1) the communication originated in a mutual *confidence*
that it would not be disclosed; and

(2) the *confidentiality* of such communications, by
securing freedom of consultation, is *essential* to the
efficient maintenance of some intimate relation between
those persons; and

(3) the *relation* is one deemed by the community to
require to be thus indirectly *fostered*; and

(4) the *injury* to that relation, caused by risk of the
disclosure of the communication, would be more serious
than the injury to justice caused by the option of its
suppression.]¹ — (W. § 2285.)

ART. 1. *Privileges Limited in Number.* No privilege for
1761 such communications is recognized, except as expressly
provided in Rules 205-212 (*post*, §§ 1765-1870.)

ART. 2. *Confidential Communications in general not Privi-*
1762 *leged.* In particular, there is no privilege for a communication
merely because it was made with a promise or a request,
express or implied, that it should be kept in confidence, wholly
or partly, by the person receiving it. — (W. § 2286.)

Illustrations. A communication is not privileged because made
in confidence to a *clerk*, a *trustee*, a *banker*, a *commercial*
agency, a *journalist*.

ART. 3. *Telegrams.* A communication is not privileged
1763 merely by reason of the method of transmission; in par-
ticular,

¹ No such broad principle has been yet recognized in terms
by the Courts, but it underlies the ensuing Rules.



§§ 1765-1768 PRIVILEGE: CLIENT'S COMMUNICATIONS

- (1) by post;
- (2) by telegraph;
- (3) by telephone. — (W. § 2287.)

RULE 205. *Attorney-and-Client Communications.* (1)
1765 Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications (4) relating to that purpose, (5) made in confidence (6) by the client, (7) are at his instance permanently protected (8) from disclosure by himself or by the legal adviser, (9) except the protection be waived;
subject to the following details and qualifications.¹ —
(W. § 2292.)

(*Reason and Policy.* The relation of attorney and client, and the communications between them, satisfy amply all four of the elements required by Rule 204 for a communications-privilege.)

ART. 1. “(1) *Where legal advice of any kind is sought.*”
1766 The privilege covers communications made in seeking any kind of legal advice. Hence:

1767 *Par. (a).* It is immaterial whether the advice relates to the present litigation, or to any other litigation either begun or contemplated at the time of the communication. — (W. § 2294.)

Illustration. An employer consults an attorney for an opinion on a form of contract offered to the employer by an employer's liability insurance company, desiring to know whether its clauses sufficiently cover the possible kinds of liability on his part to his various classes of employees; this consultation is privileged.

1768 [*Par. (b).* A consultation of an *official prosecuting attorney*, solely with a view to complaining of a public offence and to urging or enabling a public prosecution, is not privileged.]² — (W. § 2296.)

Distinguish the communication of an *informer* to any government officer, which is protected by a separate privilege (Rule 209, Art. 2, *post*, § 1837).

¹ In a number of States there are statutory definitions, which however seldom conflict with the above clauses.

² There is little authority; the above is tentative.

1769 *Par. (c).* The consultation must have in view primarily the attorney's knowledge or skill in *the law* upon some aspect of the affair submitted, and not primarily some other class of knowledge or skill which the attorney happens to possess.¹ — (W. § 2296.)

Illustration. Bill by a judgment creditor against the debtor and a mortgagee, the latter being an attorney. The debtor's consultations with the attorney when seeking a party to make the loan would not be privileged. But the mortgagee's consultation with the attorney, when seeking how to avoid the claim made by the judgment creditor, would be privileged.

1770 *Par. (d).* Consultation in the course of a transaction of *conveyance of property* is privileged in so far as the application of legal skill or knowledge is impliedly or expressly the primary reason for consulting the particular person.² — (W. § 2297.)

Illustration. (1) An attorney employed by a title-guarantee company as an abstractor of title was told, by a grantee bringing a deed to be added to the abstract, the amount of the actual consideration paid; this would not be privileged.

(2) The vice-president of a manufacturing corporation is an attorney; his customary duty in the corporation is to sign its promissory notes and other contracts; the treasurer consults him as to the advisability of renewing a certain note; this is not privileged.

Cross-references. (1) Whether the privilege covers the *contents* and *execution* of a deed, as seen by the attorney, and not merely the client's communications about the deed, falls under Art. 3, *Par. (c)* (*post*, § 1782).

(2) Whether a *testator's communications* made for the drafting of a will should for other reasons fall without the privilege, involves Art. 5, *Par. (g)* (*post*, § 1794).

1772 *Par. (e).* The privilege does not cover a consultation seeking by the aid of the attorney's legal skill to *effect knowingly an unlawful act*, in the nature
 either of a future crime
 or of a future civil wrong involving moral turpitude.³
 — (W. § 2298.)

¹ This phrasing attempts to be concrete; but the subject is elusive.

² There is here much apparent divergence of ruling, and no one phrasing has been generally accepted.

³ The general notion is universally conceded; but no accepted phrasing has yet come into vogue.

§§ 1773-1777 PRIVILEGE: CLIENT'S COMMUNICATIONS

Illustrations. (1) The client's nephew has begun a suit in ejectment, claiming as heir of the common ancestor; the nephew having shot lately a man in another State, the client consults an attorney in that State and instructs him to further in all ways a prosecution for murder, saying, "I would spend ten thousand dollars to put him in the penitentiary"; this is not privileged.

(2) The client is president of a corporation whose contract for a stock-voting trust with another corporation has just been pronounced invalid by the Supreme Court; the client requests the attorney to obtain such agreements from the largest stockholders of the other corporation as will effect, if legally possible, the same result, with respect to control, that was contemplated by the void contract; this consultation is presumably privileged, first, in that it seeks to act by lawful means only, and, secondly, in so far as the proposed act, even if the means are unlawful, is not one of moral turpitude.

ART. 2. " (2) *From a professional legal adviser in his*
1773 *capacity as such.*" The privilege covers only a consultation with a professional legal adviser in his capacity as such. Hence:

1774 *Par. (a).* The privilege does not cover a consultation with a person who has legal knowledge but is *not admitted to the bar* as a practitioner. — (W. § 2300.)

1775 *Par. (b).* The privilege covers a consultation with any clerk or other agent acting on behalf of the attorney, in so far as a consultation with the attorney himself would have been privileged. — (W. § 2301.)

1776 [*Par. (c).* The privilege depends on the client's *intent and reasonable belief* as to the status of the person consulted, under *Par. (a)* and *Par. (b)* above.]¹ — (W. § 2302.)

1777 *Par. (d).* The consultation must contemplate the attorney as a *professional legal adviser*, and not merely as a friend, a public officer, or otherwise; and for this purpose the circumstance that the advice is given *without charge* is evidential only, and not decisive. — (W. § 2303.)

Cross-reference. For consultation with the *opponent's attorney*, see Art. 5, *Par. (c)* (*post*, § 1790).

¹ Here some Courts dissent, but not soundly.



§§ 1778-1782 PRIVILEGE: CLIENT'S COMMUNICATIONS

1778 *Par. (e).* A consultation, not otherwise privileged, is not privileged because the relation of attorney and client afterwards was formed or formerly had existed.

But a consultation *preliminary to a retainer* of the attorney is privileged even though the attorney finally declines the retainer. — (W. § 2304.)

1779 ART. 3. “(3) *The communications.*” The privilege covers all matters disclosed by the client with a view to the advice. Hence:

1780 *Par. (a).* All matters disclosed by words oral or written are within the privilege. [Matters of *personal conduct or condition* and other matters observable by the attorney without express disclosure from the client are not within the privilege, except so far as they appear to have been made the subject of an express disclosure.¹] — (W. § 2306.)

Illustration. A client consults the attorney in regard to a separation from his wife. Afterwards, on an application for committal of the client to an asylum, the privilege does not cover the attorney's testimony to the sane or insane behavior of the client in his presence. Otherwise, if the client had applied to the attorney in the committal proceedings with a view expressly to protecting him against them.

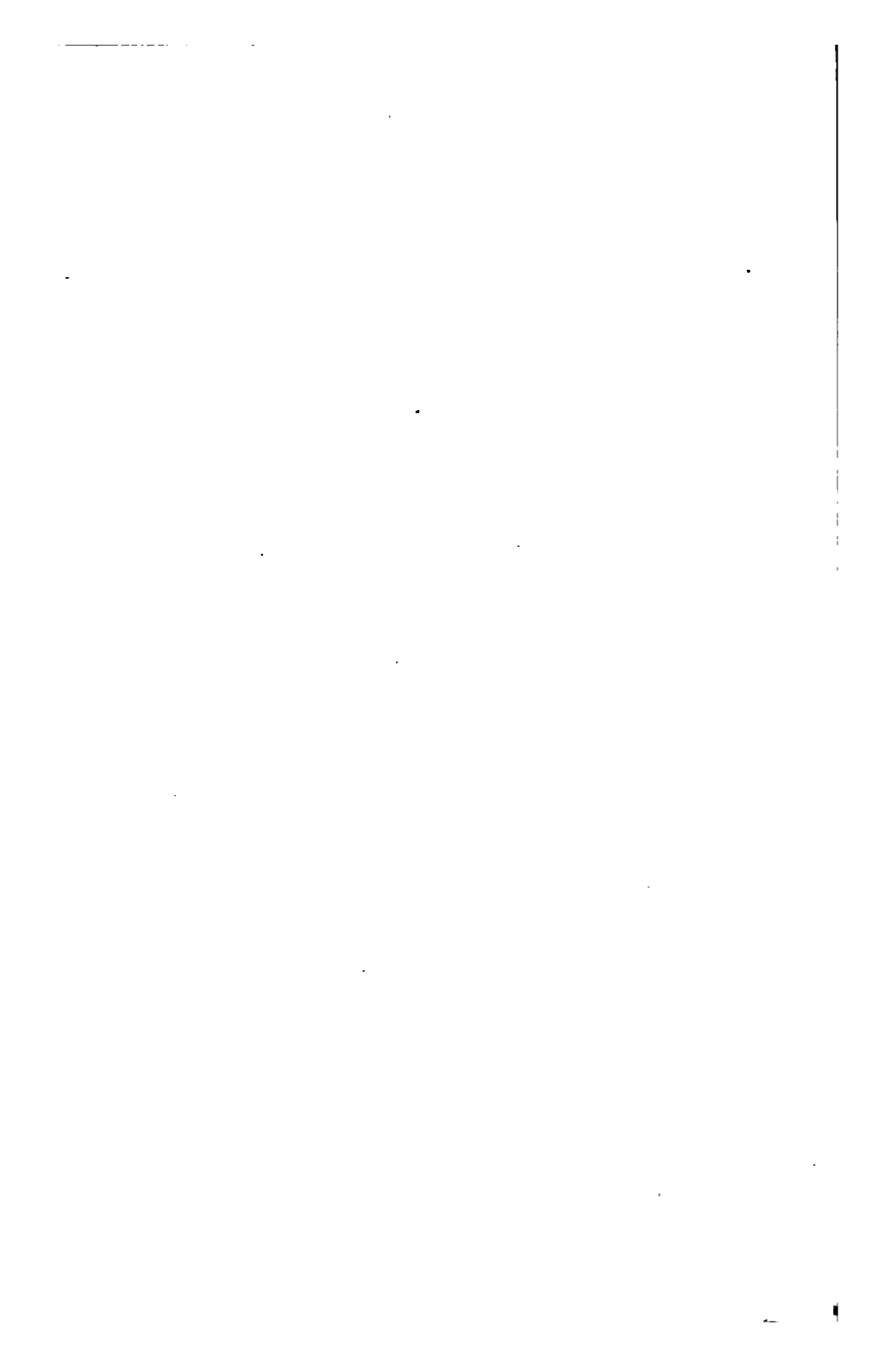
1781 *Par. (b).* The privilege covers the attorney's *knowledge* of the *contents* of a document which comes into existence merely as a communication to the attorney. — (W. § 2307.)

Illustration. The attorney's knowledge of the contents of the client's letter stating that he cannot pay his commercial debts and requesting the attorney to procure a friendly creditor to attach is privileged.

1782 *Par. (c).* The privilege covers the attorney's *knowledge* of the *contents* of a document independently pre-existing, so far as it has been confidentially disclosed to the attorney by showing, delivering, reading, or otherwise. — (W. § 2308.)

Illustration. A client consults the attorney as to bringing suit on some promissory notes, and shows him the notes.

¹ There is here some conflict in the judicial phrasings; the above clause attempts to draw the essential distinction reconciling most of the precedents.



Whether the notes at that time bore certain endorsements is within the privilege, in so far as by his testimony it is sought to ascertain what he observed on the notes. Otherwise, if he had merely seen the notes at the bank when his client was publicly receiving them from the maker or the indorser.

1783 *Par. (d).* The privilege does not cover the attorney's knowledge of the existence, execution, handwriting, or place of custody of a document *independently pre-existing*; unless such fact was made the subject of a confidential disclosure to him by the client, and this will not be presumed.¹ — (W. § 2309.)

Illustration. A client, having obtained a bond, took the bond to his attorney and indorsed it in his presence. The attorney's testimony to the handwriting and the act of signing is presumably not within the privilege; though his testimony to the client's request for advice would be.

Cross-reference. Where the attorney is also an *attesting-witness* to the execution, Art. 5, *Par. (h)* (*post*, § 1795) here applies.

1784 *Par. (e).* The privilege covers only the attorney's testimony arising from his *knowledge of the contents* of documents disclosed, and not the attorney's *physical possession* of the document as delivered to him by the client; the attorney in the latter case being merely the agent of the client for its custody.

Hence,

(1) A document of the sort dealt with in *Par. (c)* and *Par. (d)* above, viz. a document *independently pre-existing*, is compellable or not to be produced on process against the attorney, in so far as it would be compellable or not to be produced on some other ground than the present privilege, by the client himself. — (W. § 2307.)

Illustration. A husband's letters to his wife are delivered by the wife to her attorney; in a suit against the wife for divorce, the attorney is not compellable to produce them, if the wife would be privileged to withhold them as marital communications; otherwise, the attorney is compellable.

But

1785 (2) A document of the sort dealt with in *Par. (b)*

¹ This is the net result of the precedents, though their grounds are not always clear.

above, viz. a document which *comes into existence merely as a communication* to the attorney, is intrinsically nothing but a communication under the present privilege, and therefore is not compellable to be disclosed, either by the attorney's production or otherwise. — (W. §§ 2307, 2319.)

Illustration. An employer in whose factory an employee has been injured obtains (1) the foreman's report on the injury. (2) the card of instructions furnished to the employee when he first entered the employment, and sends these to the attorney, together with (3) a letter of his own stating the circumstances of the injury. On a motion to compel the attorney's production of these, the second is clearly without the privilege, the third is clearly within it, and the first may or may not be within it.

Distinctions. In applying the above Clause (2), two other principles may often come into play, if the document desired was prepared by a third person:

(1) If an *agent* of the client made the document as a communication *to and for the attorney*, it is equally protected, under Art. 6 (*post*, § 1796), though not if it was made to and for the client; *e. g.* in the above Illustration, the foreman's report could be privileged if made primarily to inform the attorney concerning a possible claim, but not privileged if made primarily to the employer in the routine of factory duty.

(2) If a prospective *witness'* testimony is written out or reported before trial, either to client or to attorney, the opponent's right to *discovery before trial*, under Rule 161, Art. 3 (*ante*, § 1332), does not extend to learning the names of the witnesses and their prospective testimony; *e. g.* in the above Illustration, the foreman's report might not be subject to discovery before trial, even though not privileged at trial.

ART. 4. “(4) *Relating to that purpose.*” The privilege 1786 covers all disclosures made as a part of the purpose of the client to obtain legal advice, [whether or not any specific matter be deemed actually necessary or material or relevant thereto].¹ — (W. § 2310.)

ART. 5. “(5) *Made in confidence.*” The privilege does 1787 not cover communications not made in confidence; subject to the following details and qualifications: — (W. § 2311.)

¹ Different phrasings are here found, varying mainly as to the bracketed clause.

§§ 1788-1794 PRIVILEGE: CLIENT'S COMMUNICATIONS

1788 *Par. (a).* The mere fact of a communication between attorney and client does not raise a *presumption* of confidentiality. — (W. § 2311.)

1789 *Par. (b).* A communication made in the *presence* of a *third person* is not confidential, whether made to the attorney or to the third person. — (W. § 2311.)

1790 *Par. (c).* A communication to the *opposing party's attorney* is not ordinarily confidential. — (W. § 2312.)

1791 *Par. (d).* A communication to a *joint attorney* is confidential only as to other persons than those employing the attorney in common. — (W. § 2312.)

1792 *Par. (e).* The *circumstances of the case* are to determine whether the communication was in its nature confidential.¹ — (W. § 2312.)

Cross-reference. For the rule as to *offers to compromise*, irrespective of the present privilege, see Rule 118, Art. 1 (*ante*, § 642).

1793 *Par. (f).* The *identity* of the client, the authority of the attorney, or the name of the real party in interest in the litigation, can never be confidential.

But the nature of the party's title or interest, and the motive of the suit, may be confidential.² — (W. § 2313.)

1794 *Par. (g).* The confidence may be *temporary* or limited in its nature.

(1) Hence, the privilege does not apply to the testimony of an attorney *drafting a will*, when he is called on, after the testator's death, to disclose any circumstance affecting the execution or the contents of the will, [including matters tending to show insanity or undue influence.]³ — (W. § 2314.)

¹ There are many precedents for which no rule of thumb can be used.

² There are here numerous precedents; the above phrasing seeks to draw a fair distinction.

³ On the bracketed clause, a few Courts unsoundly take the opposite view.

§§ 1795-1797 PRIVILEGE: CLIENT'S COMMUNICATIONS

Cross-reference. Whether one or another of the representatives may waive the privilege is dealt with in Art. 9, Par. (b) (*post*, § 1807).

1795 Par. (h). The *attestation* of a deed or a will by the attorney at the request of the grantor or testator negatives confidentiality for the purpose of his testifying as to the execution or the contents of the document. — (W. § 2315.)

Cross-reference. For the waiver of privilege by a testator's representatives after death, see Art. 9, Par. (b) (*post*, § 1807).

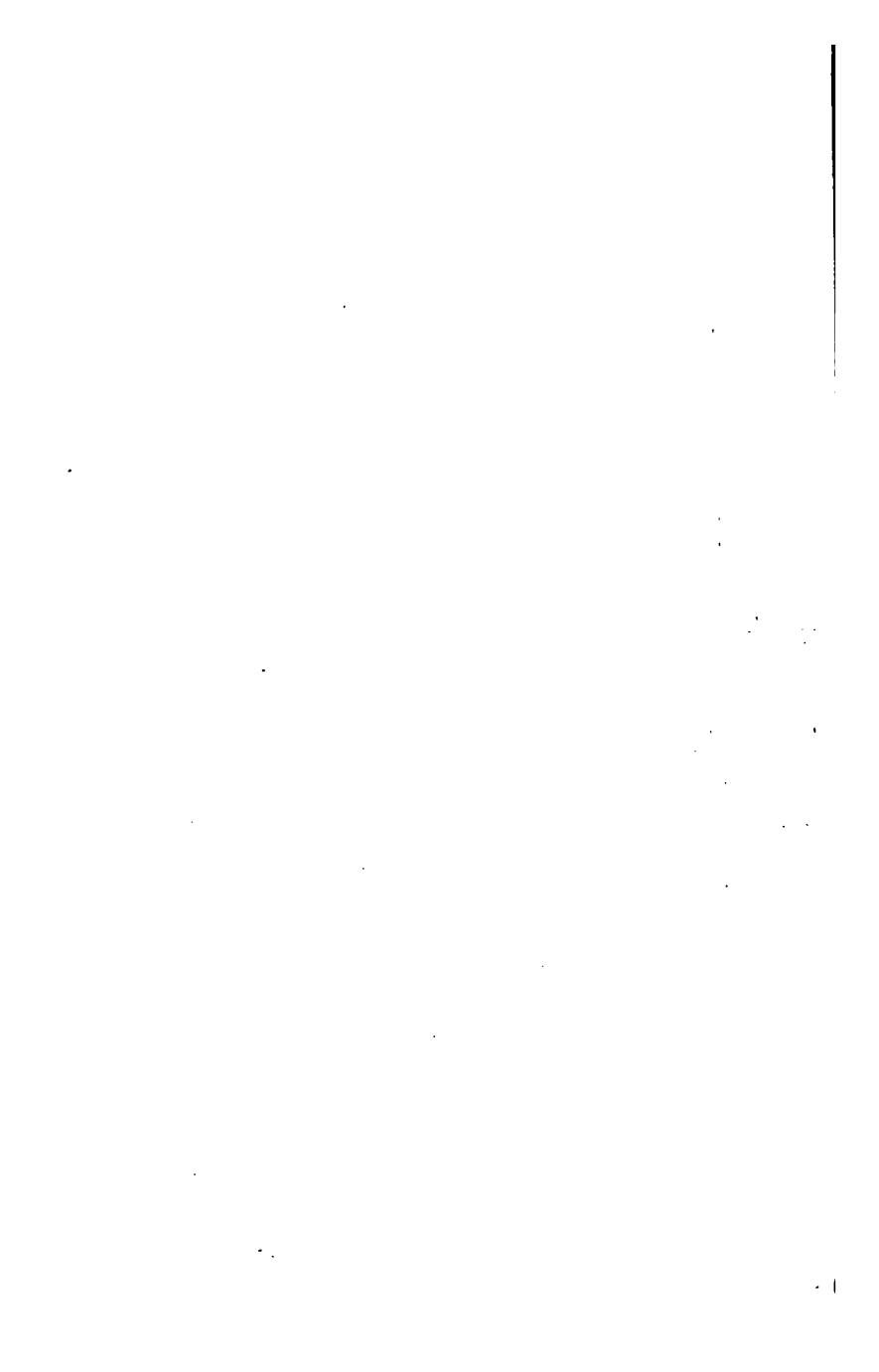
1796 ART. 6. “(6) *By the client.*” The privilege applies only to communications between the client and the attorney, and not to communications from *third persons*.

But it includes communications by any form of *agency* used by the client, whether the agent be an interpreter, messenger, or clerk, and whether he communicate to the attorney directly or through the client for the attorney, and whether he be employed by the client himself or by the attorney for the client. — (W. § 2317.)

1797 Par. (a). In the use of the present rule in connection with that for producing *documents constituting a communication* (Art. 3, Par. (e), *ante*, § 1784) and with the principle of *discovery before trial* (Rule 161, Art. 4, *ante*, § 1335), the following distinctions are to be applied:— (W. §§ 2318-2319.)

(1) Where production of a document is opposed on the ground of the present *privilege* for *agent's communications* to the attorney, the document must be one made primarily for some use by the attorney in giving legal advice for a specific case, and not primarily in the course of the client's usual business. But if the document is privileged, the privilege applies as well to *production at the trial* as to discovery on motion before trial.

(2) Where the production of a document is opposed on the ground of its containing the names or testimony of prospective witnesses, and therefore not being subject to *discovery before trial*, the document must be one made primarily for the sake of recording useful information for a litigation, and not primarily in the course of the client's usual business. But in any case the exemption



from discovery applies only to motions for *production or inspection before trial*.

Illustrations. Upon the occurrence of a personal injury by an explosion in a factory, the foreman sends for a physician, and then records the circumstances on a form-sheet used for reports of daily occurrences. Afterwards, a claim for damages is made and resisted. The client forwards to the attorney (1) the foreman's report. The attorney (2) obtains a supplementary written report from the foreman, (3) makes notes of the physician's oral statement, and (4) also by other inquiry secures a list of the names and addresses of two bystanders with notes of their accounts. (a) Before trial, on a motion for discovery, the production of (4), and perhaps also of (3) and of (2) could be resisted on general grounds of discovery. But on the ground of the present privilege, (4), (3), and (2) could plainly be withheld. (b) At trial, on a motion to produce, the present privilege would cover (4), (3), and (2), but not (1).

ART. 7. "(7) *Are at his instance permanently protected.*"

1798 The privilege, being intended for the protection of the client, is to be exercised for his protection only.

1799 *Par. (a).* The attorney, when called as witness, may and must claim the privilege in the interest of the client, until it appears that the client waives it. — (W. § 2321.)

1800 *Par. (b).* The party to the cause, or his attorney, cannot as such make claim to the privilege; but an erroneous sanction to a privilege may be ground of exception to the party, on the general principle of Rule 198, Art. 7 (*ante*, § 1673). — (W. § 2321.)

1801 *Par. (c).* No inference ought to be drawn, from the act of claiming privilege, as to the tenor of the communication withheld. — (W. § 2322.)

1802 *Par. (d).* The privilege, being intended to secure a confidence on the client's part that no disclosure will be made, is *not limited in time*, and therefore does not cease

(1) upon the ending of the relation of attorney and client;

(2) nor, upon the death of the client;

(3) nor, upon the death of the attorney.

Cross-reference. Where the confidence was originally intended to be *temporary* only, Art. 4, Par. (g) applies (*ante*, § 1794).

ART. 8. “(8) *From disclosure by himself or by the legal*
1803 *adviser.*” The privilege protects from disclosure by either
the attorney or the client himself, or their agents for making
the communication, but by no one else. — (W. § 2324.)

Par. (a). Where by *involuntary disclosure of attorney*
1804 or client the communication comes to the knowledge of a
third person, the privilege does not cover the testimony of
the third person.¹ — (W. §§ 2325, 2326.)

Illustrations. (1) The attorney and the client discuss in his
private office; upon using loud tones, they are overheard
by the tenant of the next room, through a thin partition
door; the privilege cannot be invoked for the tenant's testi-
mony.

(2) A memorandum of the foregoing conversation is
stolen from the attorney's coat-pocket in a street-car; a
person obtaining it from the thief can use it on the trial.

ART. 9. “(9) *Except the protection be waived.*” The
1805 protection of the privilege may be waived, expressly or
impliedly, by the client or by some one acting on his behalf.

Par. (a). The *attorney* may waive on behalf of the
1806 client, in so far as in good faith he deems it necessary to
make disclosures in the course of litigation.² — (W.
§ 2325.)

Illustration. In an action on a renewed note, the attorney
while seeking a settlement from the debtor before suit begun,
shows the debtor a letter from the client concerning the
consideration originally given for the note. On trial, the
debtor may testify to the contents of the letter thus shown.

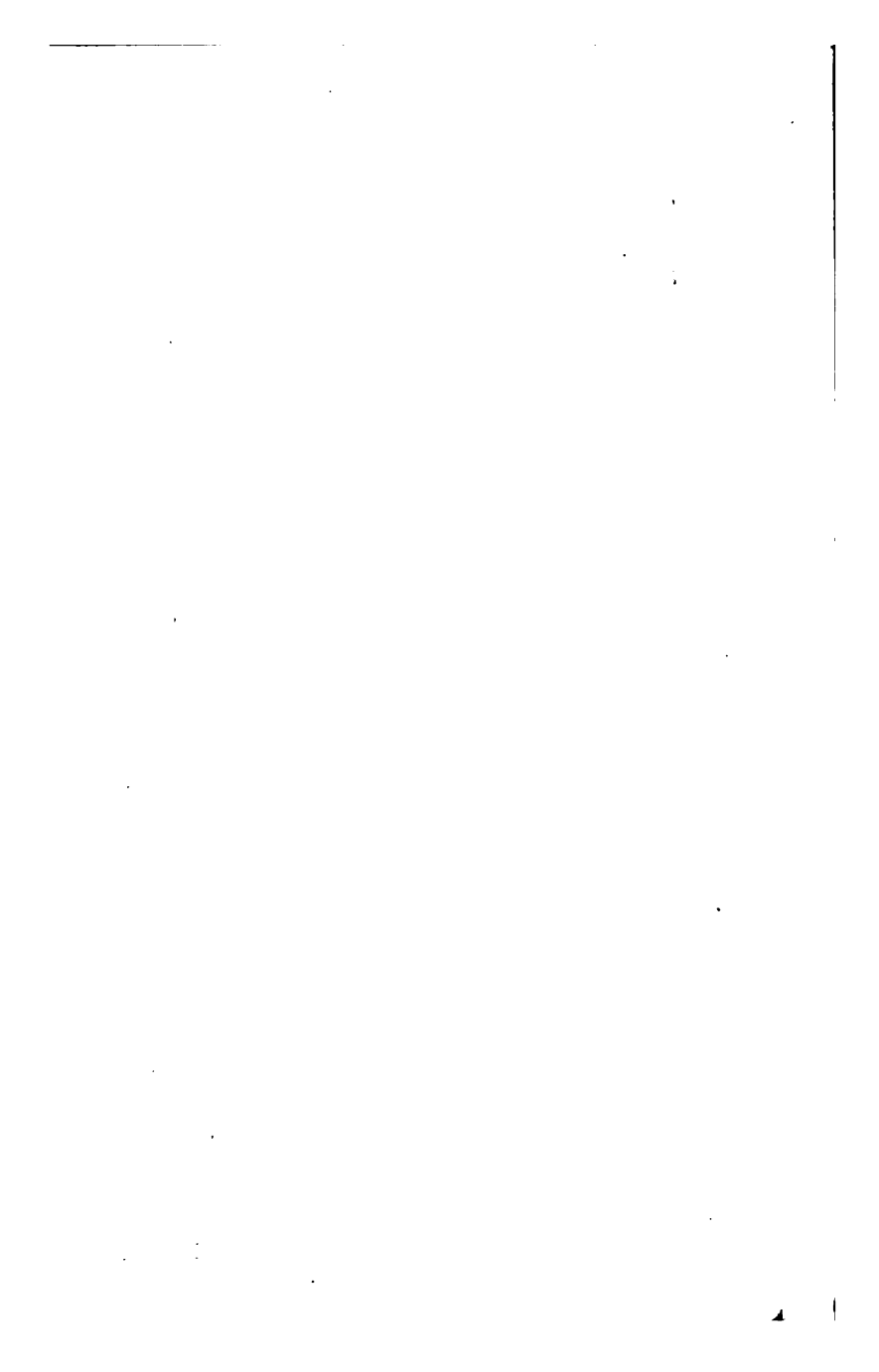
Par. (b). The *successor in interest* may waive, including
1807 the executor, administrator, heir, next of kin, and legatee.³
— (W. §§ 2328, 2329.)

[Par. (c). The *client himself* may waive by implication;
1808 the following rules apply:

¹ Some Courts are opposed, in cases like *Illust.* (2).

² The precedents do not all speak so broadly.

³ There is here an occasional dissent.



(1) the testimony of himself or of the attorney, as to a *part of any communication* privileged, is a waiver as to the remainder;

(2) the testimony of himself or of the attorney, as to a *specific communication*, is a waiver as to all other communications on the same matter;

(3) the testimony of *himself* in the *cause at large* is not a waiver for any purpose;

(4) the testimony of the *attorney* in the *cause at large* is not a waiver so far as his testimonial knowledge has been acquired casually, i. e., independently of his relation to the client; but otherwise it is.

(5) the testimony of the client or of the attorney as to *specific facts* communicated to the attorney is a waiver or not, according to the same rules as Clause (3) and (4) above.]¹ — (W. § 2327.)

1812 RULE 206. *Husband-and-Wife Communications.* A confidential communication by one spouse to the other is protected permanently from disclosure by either, except the protection be waived;

subject to the following details and qualifications:² — (W. §§ 2332-2334.)

(*Reason and Policy.* The relation of husband and wife, and the confidential communications between them, satisfy amply all four of the elements required by Rule 204 (*ante*, § 1760) for a communications-privilege.)

1813 ART. 1. “(1) A *confidential communication by one spouse to the other.*” The privilege covers all communications [whether or not] intended to be confidential.³ — (W. § 2336.)

1814 *Par. (a).* Marital communications are *presumed* confidential, until the contrary appears.⁴ — (W. § 2336.)

1815 *Par. (b).* A communication is presumed not confidential

¹ Here the precedents afford no clear rules. The above paragraph attempts to work out the principle.

² Statutory phrasings vary.

³ A few statutes and Courts improperly recognise the bracketed clause.

⁴ No more detailed rule is feasible for the various situations.

- (1) when made in the *presence* of a *third person*; or
- (2) when intended for *transmission* to a *third person*.¹

— (W. § 2336.)

Illustration. A husband, starting on a journey, charges his wife with the task of trying to obtain a purchaser for some real estate; the information so given is not confidential, so far as it was to be told to others.

Distinguish (1) the rule for a *third person overhearing* (Art. 2, Par. (a), *post*, 1819);

(2) the rule for *admissions by silence* when statements are made in husband's or wife's presence (Rule 119, Art. 2, *ante*, § 668); this presupposes that the privilege is held not to apply.

Par. (c). The privilege covers

- 1816 (1) *words* of communication, oral or written; and
- (2) *conduct* known to the spouse by virtue of the marital relation [when intended as the subject of confidential knowledge.]² — (W. § 2337.)

Illustration. A husband comes home with a valise, and tells the wife, "I am going tonight to New York; this valise contains bonds from the office; I leave it in the closet; and no one is to know what it contains or where it is." Here all his conduct and the facts are confidential. Otherwise, if he had merely brought home the valise and put it in the closet and she had opened it and seen the bonds.

Par. (d). The privilege does not extend to the following
1817 excepted cases: — (W. § 2338.)

[(1) proceedings based on *injuries done by one to the other*; ³ including]

(2) proceedings for divorce or damages based on *criminal conversation* or *alienation of affections*. — (W. §§ 1730, 2338.)

Cross-reference. For the admissibility of a *wife's correspondence*, under the hearsay exception, see Rule 153, Art. 2, (*ante*, § 1207).

ART. 2. "(2) *Is protected permanently from disclosure by*
1818 *either.*" The privilege, being intended to secure freedom

¹ This sums up the general attitude of Courts.

² A number of Courts unsoundly ignore the bracketed clause.

³ A few statutes expressly so provide.



§§ 1819-1823 PRIVILEGE: MARITAL COMMUNICATIONS

of confidential communication between the spouses, protects themselves only from disclosure,
but protects them permanently.

1819 *Par. (a).* Where by *involuntary disclosure* of either the communication comes to the knowledge of a *third person*, the privilege does not cover the testimony of the third person.¹ — (W. § 2339.)

Illustrations. (1) and (2); see the Illustrations for attorney and client (Rule 205, Art. 8, *ante*, § 1804), which equally apply here.

Distinguish the making of a communication in the known presence of a third person; there no confidence exists, therefore no privilege arises (Art. 1, Par. (b), *ante*, § 1815).

1820 *Par. (b).* The privilege remains even after the marriage has been *dissolved*, for communications made during marriage; *i. e.*

(1) after *death* of one or the other; and

(2) after *divorce*. — (W. § 2341.)

1821 *Par. (c).* The privilege ceases for communications made after the marriage relation ceases *de facto* or *de jure*. — (W. § 2341.)

1822 ART. 3. “(3) *Except the protection be waived.*” The privilege, being intended to secure mutual exchange of knowledge confidentially, may be waived [by both, and not] by either alone.² — (W. § 2340.)

Distinguish the rule *disqualifying* a spouse, by interest, to testify for the other as a party (Rule 85, Art. 1, *ante*, § 396); that disqualification cannot be waived.³

1823 *Par. (a).* The party to the cause cannot as such make claim or waiver of the privilege; but an erroneous sanction of the privilege may be ground of exception to the party, on the general principle of Rule 198, Art. 7 (*ante*, § 1673).

¹The rulings are not harmonious on the subject of Illust. (2).

²Courts differ as to the bracketed clause. To accept it seems sounder.

³Some statutes and courts ignore this distinction, by not recognizing a waiver of the privilege.

Distinguish the privilege for one spouse not to testify to facts against the other as a party (Rule 202, *ante*, § 1710); the present privilege applies to married persons in general, regardless of their being parties.

RULE 207. *Communications between Petit Jurors.* A communication of one petit juror to another, during retirement of the jury (including a vote cast), is privileged from disclosure. — (W. § 2346.)

(*Reason and Policy.* All four considerations of policy named in Rule 204 (*ante*, § 1760) as the foundation of privileges are plainly here applicable.)

ART. 1. *Whose is the Privilege.* The privilege may be waived only by all the jurors, with consent of court.¹

ART. 2. *Third Persons Overhearing.* A third person overhearing or intercepting the communication is not prohibited from disclosure.²

ART. 3. *Exception for Setting aside or Correcting the Verdict.* The privilege does not apply where a juror's conduct or utterance is allowed to be proved for the purpose of setting aside or correcting the verdict under Rule 219 (*post*, § 1947).

Distinctions. That part of the *parol-evidence* rule which concerns the correcting or setting aside of a verdict on the ground of misconduct, bias, error, etc., of jurors, by their affidavits or otherwise, comes into conflict with the present privilege at certain points, and to that extent may override it; the main points of difference are:

(1) The *privilege* applies in any proceeding and for any purpose; the *parol-evidence* rule applies only where the verdict is sought to be nullified or corrected in a proceeding for that purpose.

(2) The *privilege* may be waived by consent of all the jurors (and perhaps of the one communicating); the *parol-evidence* rule either permits or prohibits the use of the communication to affect the verdict, but in either case independently of the juror's consent.

¹ There appears to be no direct authority, but the analogies of the other privileges lead to this.

² This follows the analogies of other privileges; and it is implied in all authorities under Rule 219 (*post*, § 1947).



RULE 208. *Communications between Grand Jurors.* A communication of one grand juror to another, during retirement of the jury (including a vote cast), is privileged from disclosure. — (W. § 2361.)

(*Reason and Policy.* All four considerations of policy named in Rule 204 (*ante*, §1760) as the foundation of privileges are plainly here applicable.)

ART. 1. *Whose is the Privilege.* The privilege may be waived only by all the jurors, with consent of court.¹

ART. 2. *Exception for Testimony of Witnesses and for Quashing Indictment.* The privilege does not apply

(1) where by Rule 209, Art. 1 (*post*, § 1834) the testimony of witnesses to the grand jurors, and the questions of jurors therein involved, are allowed to be disclosed;

(2) nor, where by Rule 219, (*post*, § 1947) the indictment is allowed to be quashed for misconduct, error, or otherwise.

Distinctions. These other two rules form the main part of the rules applicable to grand jurors, but are distinct in their policies and details; they are conceded to override the present privilege whenever at any point they conflict.

RULE 209. *Witnesses and Informers' Communications to Grand Juries and Public Prosecutors.* A communication by a witness, as complainant or otherwise, made to a grand jury, and a communication by a witness or informer, made to a public prosecutor, and in either case with a view to the investigation of a matter within the duties of such officers, is privileged from disclosure by any person;

subject to the following qualifications and distinctions:— (W. §§ 2360, 2374.)

(*Reason and Policy.* All four considerations of policy named in Rule 204 (*ante*, §1760) as the foundation of privileges are here plainly applicable. The only special features here are that the second element, the necessity of confidentiality, requires only a temporary secrecy; and that the interests of the prosecution extend also to keeping the information from indicted persons, so that the prosecution may succeed in apprehending them.)

¹ There is no direct authority, but this seems sound.

ART. 1. *Testimony before Grand Jurors.* Testimony given
1834 before a grand jury is privileged from disclosure by any person, whether a juror, a public prosecutor, the witness himself, or one who is lawfully or unlawfully present, until the necessity for secrecy ceases.¹ — (W. §§ 2360, 2361.)

1835 *Par. (a).* The necessity ceases ordinarily when the grand jury has completed its investigation by returning a *finding* upon the subject affected by the testimony and the public prosecutor has filed it in court.²

1836 *Par. (b).* The testimony may thereafter be disclosed, when material and relevant, in any proceeding; — (W. § 2363.)

in particular;

(1) in any proceeding in which the witness is to be discredited by such testimony, as *witness* or as *party*;

(2) or, in a prosecution for *perjury* committed in such testimony;

(3) or, in an action for *defamation* or *malicious prosecution* based on such testimony.

ART. 2. *Information to Public Prosecutor.* A communication made to a public prosecutor, purporting to disclose matters concerning a public offence, is privileged from disclosure as to the identity of a person so informing or advising the informer.³ — (W. § 2374.)

Distinguish the privilege for communications between *client* and *attorney* (Rule 205, Art. 2, *ante*, § 1773).

1838 *Par. (a).* The Court may in case of necessity require disclosure.

1839 [*Par. (b).* The privilege does not apply where the identity of the person is *already otherwise disclosed*.]⁴

¹ Statutes here usually state the rule, but not satisfactorily.

² This represents the implied effect of the decisions and statutes.

³ No accepted form of phrasing is found; the above represents the essential feature.

⁴ This is perhaps not accepted by some Courts.

1840 *Par. (c).* The privilege does not apply to the *contents* of the information thus given.

1842 **RULE 210.** *State Secrets and Official Communications.* A communication on official matters by one official to another, or a matter of official action known to an official, is privileged from disclosure;
subject to the following qualifications and distinctions:
— (W. § 2375.)

(Reason and Policy. The four considerations named in Rule 204 (*ante*, § 1760) as the foundation of privileges apply here to that part only of the rule which is covered by Art. 2, Par. (a) and (b), below. Any larger scope lacks usually the first and always the second and the fourth of those considerations.)

1843 **ART. 1.** *Whose is the Privilege.* The disclosure may be made,

Par. (a). Wherever the privilege is waived by the chief officer of the government department concerned. — (W. § 2376.)

1844 [*Par. (b).* Or, wherever the Court deems the disclosure essential for doing justice and not relatively harmful to other interests of the State.]¹

1845 **ART. 2:** *Scope of the Privilege.* The privilege applies to the following classes of matters:

Par. (a). To matters affecting the State's *international* relations, including *military affairs* when they affect such relations.

1846 [*Par. (b).* To measures of *political policy* contemplated by the responsible officers of government.]²

¹ This is not law in England; in the United States little direct authority is found, except Chief Justice Marshall's which accords. But no other rule is tolerable.

² No Court has yet phrased this; it is here named to keep it distinct from the ensuing Paragraph.



1847 [Par. (c). To any matter of confidential *official action*, including any *document* in official custody.] ¹

Illustrations. (1) A confidential letter from the land-office commissioner to an agent of the land-office directing him not to file a land-patent just transmitted, and stating that it had been obtained by fraud, would be privileged.

(2) A record of a receipt for internal revenue taxes, paid for a license to sell liquor, kept in the office of the Federal collector of internal revenue, would be privileged under a regulation of the Treasury making such records confidential.

1848 [ART. 3. *Privilege not applicable to Published Matters.* The privilege is not applicable where the matter has already otherwise become published, so that no interest of State can be served by enforcing a privilege.] ²

Illustration. In a prosecution for selling liquor contrary to State law, after testimony that a purporting Federal tax-receipt was publicly posted in the defendant's shop, the privilege does not apply to the disclosure of the official original record of the receipt.

1849 [ART. 4. *Privilege not applicable in lieu of Immunity from Civil or Criminal Liability.* The privilege is not applicable where the issue is whether a defendant is by civil or criminal law exempt from liability for his official acts and the only purpose of claiming a privilege could be to obtain thereby such exemption from liability.] ³— (W. § 2368.)

Illustration. (1) In an action against the defendant for illegal imprisonment, the defendant being a military officer in Manila and the plaintiff being a journalist who was there imprisoned, the plaintiff seeks to prove that the defendant was the person who issued the order for his arrest, and calls for the record of such orders; there is no privilege; for either the defendant is exempt, in which case the ruling can be made on demurrer on that ground and the order is immaterial, or the defendant is not exempt, in which case the privilege should not be used as an evasion of his liability.

(2) Slander for speaking and voting in the Senate against the plaintiff, a nominee for office; the senator's utterance being immune, no testimonial privilege is needed.

¹ This is accepted in England, a few States, and some inferior Federal Courts. It is an intolerable doctrine, and should not be extended.

² It is not certain that this distinction is accepted.

³ In England this is not law; in the United States the question is open. Plainly the above rule is sound.



ART. 5. *Other Principles distinguished.* The following 1850 matters are dealt with by other parts of the law:

(1) The exemption of the Chief Executive, of diplomatic agents, and of other officers, from *attendance in court* as witness during term of office, under Rule 200 (*ante*, § 1685). — (W. §§ 2371, 2372.)

(2) The exemption of *public records* from removal for production in court as evidence, under Rule 196 (*ante*, § 1654). — (W. § 2373.)

(3) The exemption of the Chief Executive, by constitutional status, from obedience to *judicial process* of any kind. — (W. § 2369.)

[RULE 211. *Patient-and-Physician Communications.* A confidential communication by a patient to a physician, when consulting for medical advice, is privileged from disclosure; subject to the following qualifications and distinctions:]¹ — (W. § 2380.)

(*Reason and Policy.* Of the four considerations named in Rule 204 (*ante*, § 1760) as forming the foundation of privileges, the second and the fourth are not here fulfilled, and usually not the first. The privilege is without reason for recognition, and has been generally abused where recognized.)

[ART. 1. *Confidentiality.* A confidentiality of the communication is implied wherever the relation of patient and physician exists.]² — (W. § 2381.)

[ART. 2. *Professional Consultation.* The consultation must 1857 be with a professional physician for the purpose of seeking his professional aid.] — (W. § 2382.)

Illustration. A person arrested on a charge of rape is examined by a physician sent to the jail by the public prosecutor to obtain information to aid the officer's discretion; the privilege does not cover information so obtained.

[ART. 3. *Necessary Information only.* The privilege covers 1858 only such communications as may be appropriate to enable the physician to supply aid.]³ — (W. § 2383.)

¹ This rule is recognized by statute only, in about one half of the jurisdictions.

² This is generally accepted, but is unsound.

³ The statutes usually contain the word "necessary;" but this is obviously too narrow, and is never adhered to.



§§ 1859-1866 PRIVILEGE: PATIENT'S COMMUNICATIONS

Illustration. On consulting a physician for a sprained ankle, the patient explains that the injury was received by a fall caused by the starting of the car while the patient was standing on the platform. The latter part of the communication would be privileged, by a liberal construction, but not privileged, by a strict construction.

[ART. 4. *Information.* The privilege covers all matters brought to the physician's knowledge by voluntary act of the patient, whether in express words or in submission for observation.] — (W. § 2384.)

Illustrations. The condition of the heart, as learned by the physician's auscultation, or of a bone, as revealed by a radiograph, is privileged.

[ART. 5. *Exceptions for Crimes and Torts.* The privilege cannot be used to prevent disclosure where the physician

(1) Is a party or an accomplice in a crime;

(2) or, Is a defendant in an action for malpractice;

(3) or, Was consulted by the victim of a crime.]¹ — (W. § 2385.)

[ART. 6. *Whose is the Privilege.* The privilege is that of the patient. — (W. § 2386.)

[Par. (a). No inference ought to be drawn from a claim of privilege.]

[Par. (b). The death of the patient does not terminate the privilege.] — (W. § 2387.)

[ART. 7. *Waiver.* The privilege may be waived, expressly or impliedly.] — (W. § 2388.)

[Par. (a). An express waiver may be made by contract before litigation begun.]²

[Par. (b). An implied waiver is made in the following cases, among others: — (W. §§ 2389, 2390.)

¹ No one of these clauses has much authority yet; but all three seem necessary to prevent abuses.

² Statute prevents this in New York.

.

.

.

(1) The *bringing of an action* in which a main part of the issue is the existence of a physical ailment is a waiver for communications to any physician as to that ailment.¹

(2) The *patient's* own voluntary giving of *testimony* as to physical condition is a waiver for communications to any physician consulted as to that condition.²

(3) The *patient's* calling of a physician to testify is a waiver as to all communications to him on the subject testified to;³

and also as to all communications to other physicians on that subject.]⁴

1867 [Par. (c). The waiver may be made, after death of the patient, by any *successor in interest*.]⁵ — (W. § 2391.)

1870 RULE 212. *Penitent-and-Priest Communications*. A confession of sin, made to a professional minister of religion in the course of discipline enjoined by their church-body, is privileged.⁶ — (W. § 2395.)

(*Reason and Policy*. Of the four considerations of policy named in Rule 204 (*ante*, § 1760) as the foundation of privileges, all apply here.)

¹ No Court recognizing the privilege concedes this, except for cases of malpractice.

² This is generally not conceded by Courts; but a few statutes do so.

³ This is generally conceded.

⁴ This is generally not conceded.

⁵ A few Courts deny this.

⁶ This is law by statute in a majority of jurisdictions; it would probably be enforced by the trial Court in most others.

PART IV: PAROL EVIDENCE RULES

(LEGAL ACTS)

RULE 213. *General Principle.* For the purpose of giving
1871 legal effect to a transaction, the rules of substantive law
declare what conduct or utterances shall be necessary and
sufficient to constitute the transaction. No other conduct
or utterance is material; therefore, under Rule 3 (*ante*, § 3),
no evidence to prove such other conduct or utterance will be
admitted.¹ — (W. § 2400.)

ART. 1. *Nature of Legal Acts in general.* In so far as legal
1872 relations, other than crime and tort, are affected by voluntary
action of persons, the effect in the law is determined by some
conduct or utterance which by outward expression defines
the effect willed by the person.

Conduct or utterance, so regarded, is termed a *legal act*. —
(W. § 2401.)

The rules for a legal act may be *specific* or *general*.

A *specific* rule determines what is necessary or sufficient for
a *specific class of legal relations*; *i. e.* for the formation of a
contract, the transfer of an easement, the release of a rever-
sionary interest.

A *general* rule determines what is necessary or sufficient
for a *legal act in general* in order to have effect in any legal
relation.

The general rules alone are here concerned.

The ensuing rules apply equally to oral and to written
utterances, in so far as they purport to be legal acts, and
not exclusively to writings.

¹ The ensuing rules are of course not rules of Evidence.
Nevertheless tradition requires them to be grouped with
rules of Evidence, until a separate treatment is accepted as
orthodox.

In view of the numerous rules of substantive law here in-
volved, the present summary of this Part is more or less ten-
tative, in respect to the law of a particular jurisdiction.



Figure 1. A 3D scatter plot showing the relationship between the number of species (S) and the number of individuals (N) for various taxa. The plot is divided into three regions: 'Species-rich' (top left), 'Intermediate' (middle), and 'Species-poor' (bottom right). The axes are labeled 'Number of species (S)' and 'Number of individuals (N)'. Data points are represented by small black dots. A horizontal line is drawn at S=10. A vertical line is drawn at N=100. A diagonal line is drawn from the origin to the top right. The plot shows that as the number of individuals increases, the number of species also increases, but the rate of increase slows down as the number of individuals increases. The 'Species-rich' region contains the most data points, followed by the 'Intermediate' region, and the 'Species-poor' region contains the fewest data points.

ART. 2. *Subdivisions in the Constitution of Legal Acts.*

1873 For the purpose of giving legal effect to any act, it is considered in four stages or subdivisions:

A, its *creation*, or enactment;

B, its *integration*, or embodiment in a single memorial of expression;

C, its *solemnization*, or fulfilment of required formalities; and

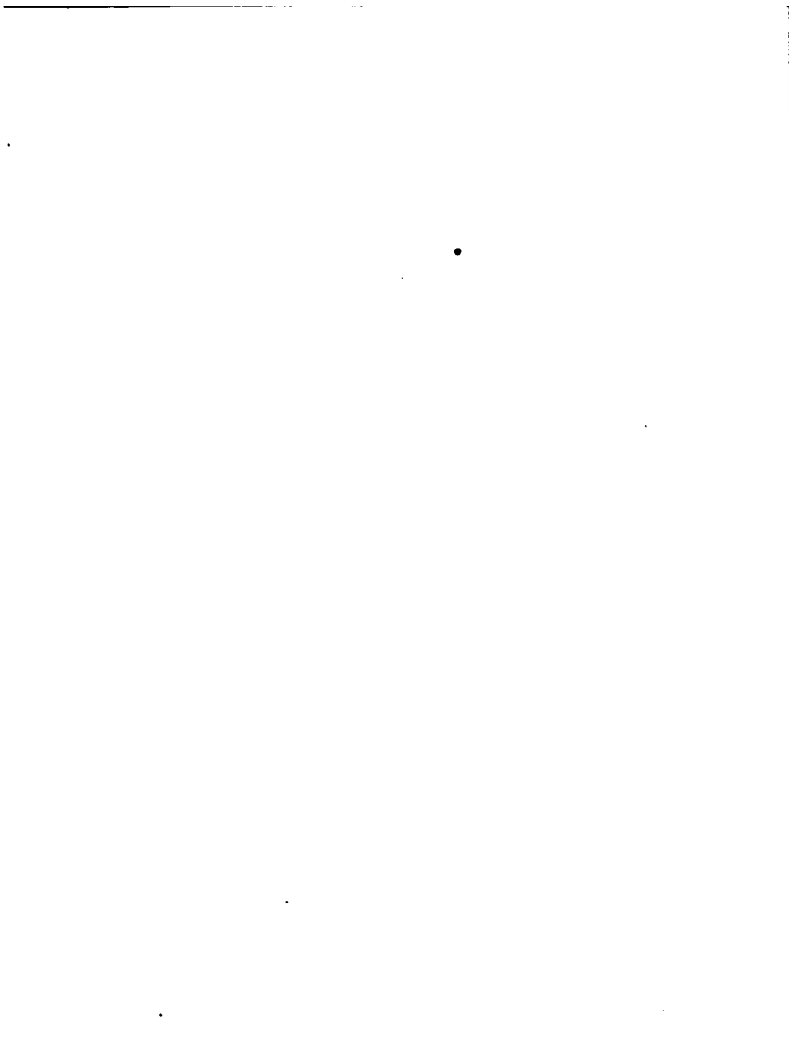
D, its *interpretation*, or application to external objects.

The ensuing rules govern these four stages of a legal act.

ART. 3. *Writings and Legal Acts.* A writing, as such, when

1874 offered for legal purposes, has intrinsically no effect; that is, it must first be tested by these general rules to ascertain whether it is to have legal effect.

Therefore, in dealing with a writing offered as having legal effect, all facts may be considered, for and against it, which by the ensuing rules would be material to determine whether the writing was enacted at all, whether it integrates the transaction, whether it was solemnized as required, and how it shall be interpreted.



TITLE I:

CREATION, OR ENACTION, OF A LEGAL ACT

RULE 214. *General Principle.* Every act must be

1877

- (1) legal in its *subject*,
- (2) defined in its *terms*, and
- (3) final in its *expression*;

and, as to subject and terms and expression, there must have been conscious *volition*;

with the ensuing qualifications and distinctions:— (W. § 2404.)

ART. 1. *Subject must be Legal.* The subject of an act must
1878 be legal, i. e. must concern the relations of persons in law. —
(W. § 2406.)

1879 *Par. (a).* An act understood by the parties as concerning only their *friendly* relations or their *moral* relations has no legal effect.

Illustration. A husband, on separating from his wife for a long voyage in search of health, makes a memorandum as to some money to be given to the husband's brother in case of need; the fact that this memorandum represented merely a domestic understanding, and not a legal claim, is material, and deprives it of legal effect.

1880 *Par. (b).* An act apparently for legal effect but actually made as a *sham* to deceive other persons, [is equally void; unless the deception was unlawful under *Par. (c).*]¹

Illustration. (1) To deceive a bank-examiner, a depositor who is also a stockholder, makes a note to the cashier, and places it in the bank's assets; the note is valid, because the deception was unlawful.

(2) To placate jealous relatives, a son gives to his father a mortgage-document for money given to the son as compensation for expenses in support of a bedridden mother. The fact that father and son do this solely to allay jealousy

¹ It is doubtful here what the law is.

of others is material, and deprives the document of legal effect as between them.

Cross-reference. (1) For the rule that if a document is intended to be valid at all, a separate *condition subsequent* is invalid, see Rule 215, Art. 2 (*post*, § 1931).

(2) For the rule that a *condition precedent* to validity is material, see Art. 4 (*post*, § 1888).

1881 *Par. (c).* An act made for a legal effect *prohibited* by law is void.

Illustration. Contracts to give a bribe, to cease public prosecution, etc.

1882 ART. 2. *Terms must be Definite.* The terms in which the act is expressed must be so intelligible as to enable a definite legal effect to be enforced. — (W. § 2407.)

Illustrations. (1) A will gives land to "J. D. and J. S. and the heirs"; this is void for uncertainty; "patent ambiguity" is a traditional term for it.

(2) A deed transfers land in "Wilson's subdivision"; no such subdivision can be found; the deed is ineffective.

1883 ART. 3. *Expression must be Final.* The outward expression must indicate a final decision to will the effects specified.

But no particular conduct or utterance is an invariable mark of such finality. Certain conduct may raise a presumption of finality.

1884 *Par. (a).* *Making a writing* is not final, but raises a presumption.¹

1885 *Par. (b).* *Signing or sealing a writing* is not final, but raises a presumption.

1886 *Par. (c).* Causing a document to be publicly *recorded* or *registered* is not final, but raises a presumption. — (W. § 2408, n. 14.)

1887 *Par. (d).* Manual *retention* of a document by the maker may nevertheless be final. — (W. § 2408, n. 4.)

Illustration. An insurer signs a policy of fire insurance on the house of M, just as M is leaving by train for a long journey. The insurer promises to forward the policy to M's

¹ Perhaps this is too broad.



agent, but fails to do so. The house burns. The policy is valid.

1888 **ART. 4. Same: Delivery.** Manual delivery of a document by the maker to another person, whether the beneficiary or a third person, is not an invariable mark of finality; but raises a presumption; subject to the following distinctions: — (W. § 2408.)

1889 *Par. (a).* Manual delivery of a document of conveyance to a third person depositary, who promises to hand it to the grantee on performance of a condition, is not final; so that the handing of it by the depositary to the grantee without performance of the condition has no legal effect. This is termed an *escrow* (or, conditional draft).

1890 *Par. (b).* But the act is final as to every purpose but the performance of the condition; hence

(1) On performance of the condition, the grantee is entitled to compel the handing over of the document.

[(2) Before performance of the condition, the maker's withdrawal of the document has no legal effect to prevent performance of the condition.]¹

1891 *Par. (c).* Manual delivery of a document of conveyance to the grantee himself on such a condition is [not] final; so that without performance of the condition the document has [no] legal effect.²

Illustration. A deed of conveyance is made, pursuant to an agreement that the grantee shall take it to the bank and on the credit of it obtain the purchase-money and otherwise return it to the grantor. The grantee shows it to the bank and is refused money. He then records it and claims title. By the rule with bracketed words he has not title.

Cross-reference. For the effect as to *purchasers without notice* of the condition, see Art. 8 (*post*, § 1908).

1892 *Par. (d).* For a *negotiable instrument*, no particular conduct, whether writing, signing, or manual delivery, is an invariable mark of finality, for either a making, a

¹ There is variance of authority on this point.

² The bracketed words are in most States not law, but they are sound on principle.

drawing, an acceptance, or an indorsement. — (W. § 2409.)

[In particular,

(1) A *manual delivery* to the obligee on a condition to be first performed has no legal effect.]¹

1893 *Par. (e).* For other kinds of transactions, including contracts in general, no particular conduct is an invariable mark of finality. — (W. § 2410.)

Illustrations. (1) A contract was proposed by A for the sale of B's corporate stock. B's agent at Milltown was already negotiating for a sale or hypothecation to another person, but could not be communicated with. The document of contract was drawn between B and A, signed, and handed to A, with the understanding that A was to go to Milltown with the document, and if on his arrival the agent should notify A that no conflicting disposition had been made, the contract between A and B should stand. In an action on the alleged contract, this understanding is material, and the fact of such notice by the agent to A would prevent the document from having legal effect.

(2) M and N sign a contract for the sale and purchase of two of three houses; the description of one is left blank until N shall have seen and selected; meantime all three are burned down just as N arrives on the scene with the contract in his pocket; whether it had legal effect depends on the understanding as to the blank.

1894 *Par. (f).* For a will, the attestation is an invariable mark of finality. — (W. § 2411.)

1895 *ART. 5. Intent and Mistake, in general.* In a legal act, as defined in Rule 213, Art. 1 (*ante*, § 1872), neither the outward expression alone, nor the inward will alone, determines invariably whether legal effect is to be given.

The act as legally effective will be determined, in respect to subject, to terms, and to finality of utterance, by that outward purport which results to the other person, if any in the transaction, as the reasonable consequence, under the circumstances, of the actor's volition. — (W. § 2413.)

1896 *ART. 6. Intent as to Subject.* Where one party has so expressed himself that the reasonable purport is a legal

¹ Some jurisdictions deny this.

transaction, it has legal effect, and his actual intention not to have legal effect is immaterial. — (W. § 2414.)

Illustration. M offers to perform a ceremony of marriage with N, who *bona fide* wishes to become his wife; M obtains a pretended parson who performs the ceremony; M intended not to become husband of N. But the marriage is valid; provided by the law of the jurisdiction a formal ceremony by clergyman or public officer is not essential under Rule 220 (*post*, § 1950).

1897 ART. 7. *Intent as to Terms.* Where the words of a document do not correspond to the actual volition of the maker, and the terms of the legal act are to be determined, under Art. 5 above, by the reasonable purport to the other party, the following distinctions may arise:

Between a document *complete* when signed and a document *incomplete* or capable of alteration;

Between *individual* mistake of one party and *mutual* mistake of both parties;

Between *different kinds of transactions*; e. g. negotiable instruments, policies of insurance, etc.

1898 Par. (a). *Complete Document signed by Mistake unknown to Other Party.* The terms of a specific and complete document are legally effective, as against a person who does an outward act of apparent assent to it while not actually intending assent to some term thereof, and in favor of a party unaware of that actual intent;

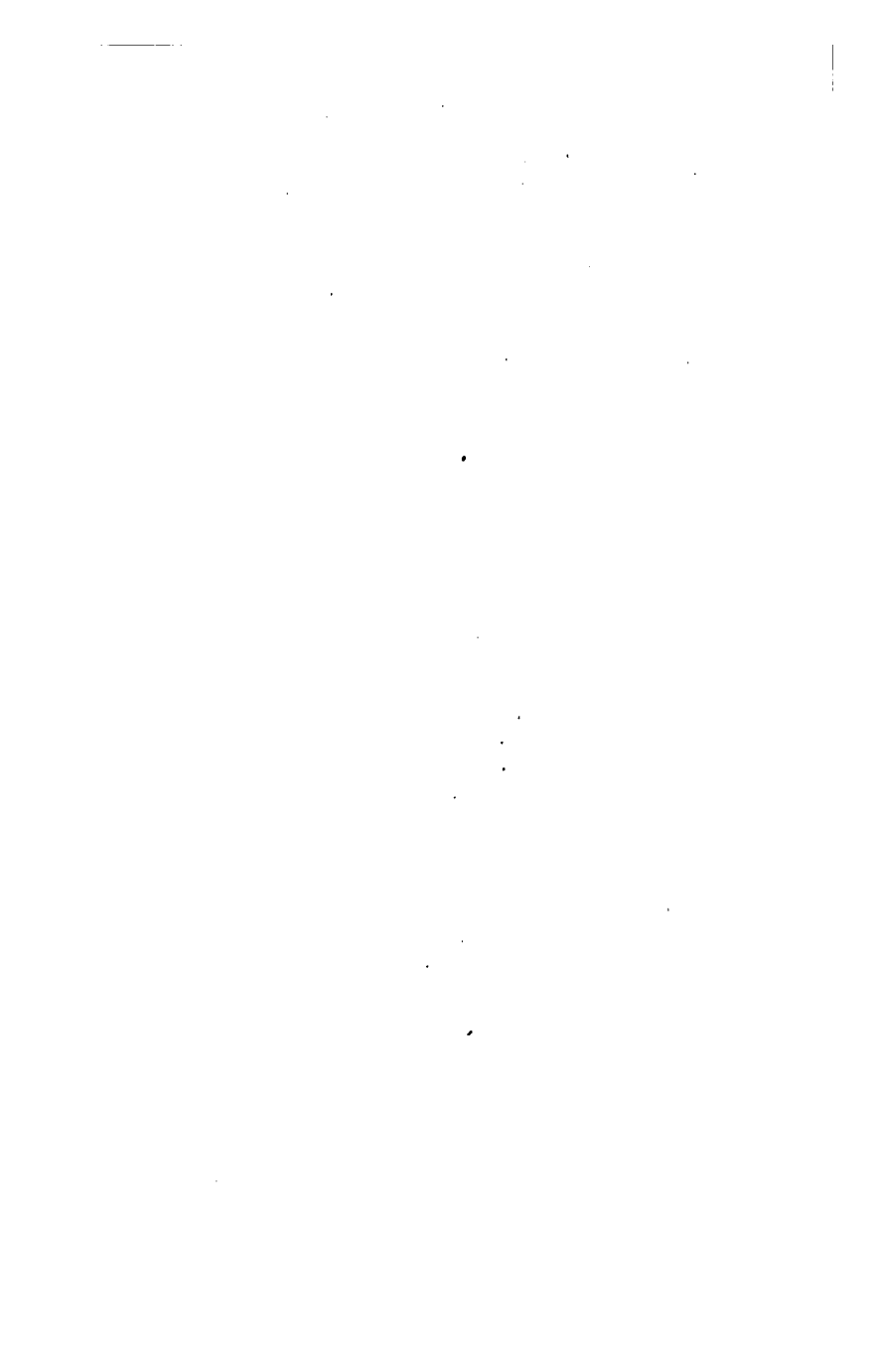
subject to the following distinctions: — (W. § 2415.)

Illustration. This is the ordinary rule for the case of a person signing a document without reading it.

1899 (1) A person unable by *illiteracy, alienage, blindness, or disease*, to read the document for himself is chargeable with the terms *signed*, in favor of a person who, being either a party to the document or one acquiring a negotiable interest thereunder, is unaware of the signer's actual intent,

unless the signer took such measures as should reasonably have sufficed to avoid mistake or deception.¹

¹ This summarizes the principle generally accepted but seldom broadly stated.



road is entitled to have the tickets cancelled, in so far as they have not been sold to *bona fide* purchasers.

- 1905 (3) A term is not valid in favor of a party who has induced the error, though unwittingly.

Illustration. An insurance agent and B agree on a policy-contract, B securing the agent's assent to the insertion of several special clauses; the agent transmits to the home office the contract, but in preparing the policy one of the clauses is inadvertently omitted; the policy is sent to the agent, who sends it to B, neither of them reading it over. Whether the omitted clause is effective depends on whether the insurer be regarded as having induced B's erroneous assent.

- 1906 *Par. (c). Completed Document signed by Mutual Mistake.* The terms of a specific and complete document are not legally effective for either of the parties, though an outward act of apparent assent has been done, in so far as the terms as written vary from the terms already agreed to be written and the error as to this variance is common to both parties. — (W. §§ 2417, 2418.)

(1) The terms are valid in favor of a person acquiring a transferable right as stated in Cl. (1), *Par. (a)* above.

(2) Whether a particular remedy shall be granted, and whether the error may be corrected by insertion or by cancellation of terms, is for the rules of chancery procedure to determine.

Distinguish the question whether a mutual mistake as to a *fact external to the document* and forming a motive for the transaction is ground for avoiding the transaction or refusing a specific remedy.

Illustration. A and B are devisees of an estate consisting of Blackacre and Whiteacre, given by will to the brothers A, B and C equally. C being dead, A and B make a deed readjusting their shares. By mistake of the conveyancer, Blackacre is not described in the deed. Later, C is discovered to be alive. The mutual mistake as to Blackacre is covered by the present rule. The mutual mistake as to C's death, the motive for the transaction, does not concern the present rule.

- 1907 *Par. (d). Document with Blanks or Alterations.* The terms of a specific document which contains a blank, or is so written as to be capable of an alteration not obvious, are legally effective as against a person who does an outward

act of apparent assent to it while not actually intending assent to a term as filled in or altered without authority, and in favor of a person taking the document without knowledge of the lack of assent, if in the circumstances the signer so acted as reasonably to be responsible for the apparent terms;

subject to the following distinctions: — (W. § 2419.)

(1) If the document was voluntarily *handed away* to another person by the signer, the signer is responsible for any term filled in blank in a space ordinarily filled.¹

(2) If the document was *retained* by the signer in his own custody and subsequently was taken without consent, the circumstances of each case control.

1908 ART. 8. *Intent as to Delivery.* Where the finality of an act, by delivery of a document or otherwise, is not actually intended by the person doing it, nevertheless it is final and legally effective in favor of a person not aware of the lack of actual intent, if under the circumstances the conduct of the actor produced, as a consequence reasonably to be expected, the appearance of finality;

subject to the following distinctions: — (W. § 2420.)

1909 Par. (a). For a *negotiable instrument*, the act of handing it away to any person raises a presumption of finality.

1910 Par. (b). For a *deed of conveyance*, the act of handing it in *escrow* to a third person is always final, in favor of a person unaware of the condition or of its non-performance.²

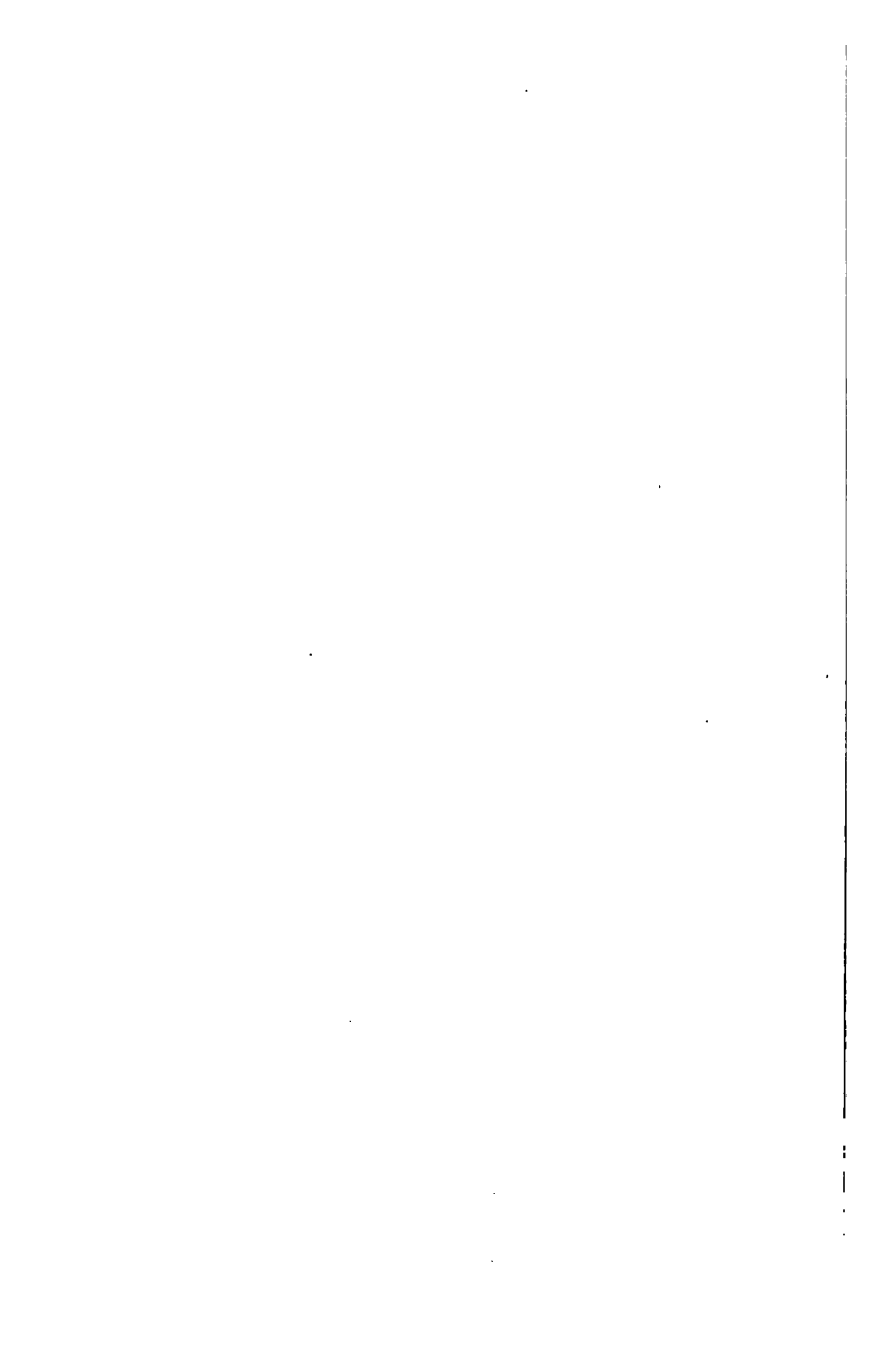
[Par. (c). For a *deed of conveyance*, the act of handing it in *escrow* to the *grantee* is always final, in favor of a person unaware of the condition or of its non-performance.³]

1911 ART. 9. *Unilateral Acts; Intent as to Wills.* The terms of a testamentary document signed by a testator are not legally

¹ There seems to be some such rule of thumb.

² This rule of thumb is accepted by most courts.

³ This rule is not needed in Courts which hold such a deed "very intrinsically final under Art. 4, Par. (c) (*ante*, § 1891).



effective, unless he did actually intend assent to the terms thereof;

subject to the following specific rules: — (W. § 2421.)

Par. (a). If the contents were so *misstated* to him that he was in error as to some term, there is no assent as to that term, even though he signed.

Par. (b). If the contents were brought expressly and correctly to his notice, by *reading aloud* or otherwise, and he then *signed*, there is assent.

Par. (c). If he *signed*, and no express notice by reading or otherwise appears to have been given, assent is presumed.¹

1912 *Par. (d).* If a *term* intended by him to be in the will is by mistake omitted, it can [not] be inserted by the Court.²

1913 ART. 10. *Voidable Acts.* Where an act has satisfied the foregoing requirements, it may still be voidable, *i. e.* liable to be annulled or confirmed at the option of one of the parties.

An act is voidable when the *motive* which has caused the parties to enact it is in law regarded as justly giving such an option.

The grounds of voidability, namely, (1) an unfulfilled condition reserved in the terms of the act itself, (2) or, an error or a compulsion preceding the act, and (3) or, a mental state of the actor, such as infancy or lunacy, are not here involved. — (W. § 2423.)

¹ These phrasings attempt to sum up the general attitude of Courts.

² The bracketed word represents the usual rule.

TITLE II: INTEGRATION OF LEGAL ACTS

1915 RULE 215. *General Principle.* If and as soon as the conduct or utterance forming a specific legal act has been embodied in a single memorial, all conduct or utterance on the subject of that act but exterior to that memorial, is without legal effect as part of the terms of that specific act, and is therefore immaterial for the purpose of determining or enforcing the terms of the act. — (W. § 2425.)

1916 ART. 1. *Varieties of Integration.* The varieties of acts integrated may be distinguished according as they are

Acts of *private parties*
or of *public officers*;
Acts integrated by *voluntary intent*
or by *compulsion of law*;
Acts *unilateral*
or *bilateral*.

1917 RULE 216. *Voluntary Integration of Unilateral Acts.* Where the person doing a unilateral act has embodied it in a single memorial, his other conduct or utterance on the subject of that specific act is immaterial.¹ — (W. § 2427.)

Illustration. A note of M is due at a bank; M goes to pay it, and a discussion ensues as to the amount of interest due; the banker and M end by disagreeing; M writes a note, offering to pay, encloses a check, and hands it to the banker. Afterwards, in an action against the indorser, the conversation of M with the banker is immaterial for the purpose of determining what were the terms of M's offer of payment.

Distinction. Whether an act, *e. g.* a notice to quit or a demand for payment, *must* be done in *writing* and otherwise is void, is a question of formalities (Rule 220, *post*, § 1950).

¹ Few questions arise under this head.



RULE 217. *Voluntary Integration of Bilateral Acts.* Where
 1920 the parties to a specific bilateral act have by mutual intent embodied it in a single memorial, all their conduct or utterance on the subject of that act, preceding or accompanying the execution of the memorial, is supplanted by the memorial, and is immaterial as a part of the terms of that specific act. — (W. § 2430.)

ART. 1. *Mutual Intent as to the Specific Act.* The scope of
 1921 the integration, as supplanting the other conduct or utterance, is determined by the mutual intent of the parties as to the subject of the memorial. Hence, conduct or utterance, forming a legal act, but not intended to be part of the subject of the memorial, is not supplanted and is still legally effective, and may be enforced in any appropriate proceeding. — (W. § 2430.)

Illustration. A real estate dealer and a banker, who have had several transactions under correspondence, meet to settle them before leaving on a journey. The dealer wants a loan for floating the sale of a parcel of land owned by him; a client of his wants to pay a mortgage owned by the bank; the banker wants him to renew a note coming due; they finally agree on certain terms, sign certain documents, and part. At a subsequent trial, a signed document providing for a secured loan on the parcel of land is offered by the banker; presumably for the relations affected by this document, the terms of conversations or writings concerning the client's mortgage or the dealer's note would be immaterial, and *vice versa*, because the three matters are separate subjects of transaction, and presumably would not be integrated in a document covering a specific one of them.

Par. (a). Since the intent of the parties determines the
 1922 scope of their memorial, that *intent* is to be *ascertained from their conduct and utterances* preceding and accompanying the execution of the memorial, pursuant to Rule 60 (*ante*, § 271), governing evidence of intent; but when that intent is thus ascertained, the conduct or utterances on subjects falling within the scope of the memorial are not to be given legal effect.

Illustration. In the preceding illustration, the dealer's prior letter, offering to renew the note for double the amount as a consideration for the new loan, and the banker's oral refusal, may all be considered evidentially; but in no way can such letter or such refusal be given legal effect, as to the



document of loan, when it once appears that the loan was treated as the sole subject of disposal in the document.

1923 *Par. (b).* The test of intent, for the above purpose, is not to depend merely on whether the conduct or utterance *varies in terms* from the writing; and even when no such variance appears, the memorial may be treated as supplanting the conduct or utterance.¹ — (W. § 2431.)

Illustration. In the foregoing illustration, the document of loan provides that payment is to be made by notes given Jan. 1, July 1, etc. The dealer maintains that by oral agreement a renewal-note of the pre-existing note for the prior transaction was to be accepted by the banker; this agreement will not be given effect, because the document specifies the mode of payment, and its terms alone can be given effect.

1924 *Par. (c).* The evidential sources of intent, for the above purpose, are *not exclusively the words of the document*, but include the conduct and utterances exterior to the document.² — (W. § 2431.)

1925 *Par. (d).* The parties' intent is found in the *circumstances of each transaction*; there is therefore no single and invariable rule for any class of documents for determining the scope of the integration and the immateriality of conduct or utterances exterior to the document.

1926 *ART. 2. Application of the Rule to Specific Kinds of Documents.* Subject to the inferences of intent in any particular transaction, as determinative under Art. 1 above, the following provisional rules apply:

1927 *Par. (a).* A document acknowledging the *receipt* of value, and not being a release or a contract, is a mere admission, evidential under Rule 115 (*ante*, § 630), but is not presumed an exclusive memorial. — (W. § 2432.)

In particular,

1928 (1) A *bill of lading*, in its recital of goods received, is [not] presumed an exclusive memorial.

¹ This paragraph is needed, to avoid the improper use of the phrase "varying the writing" as a mere rule of thumb.

² A few Courts unsoundly say that the document is the "sole criterion" of intent; but no Court observes this.



1929 (2) A *deed of conveyance*, in its recital of *consideration* received, is not presumed an exclusive memorial. — (W. § 2433.)

1930 *Par. (b).* A document of *warranty* is presumed an exclusive memorial. — (W. § 2434.)

1931 *Par. (c).* Any document is presumed an exclusive memorial with reference to any appurtenant *agreement not to sue*, or *not to enforce the claim*, or to enforce it *on a condition only*. — (W. § 2435.)

Distinguish (1) an understanding that the document shall be a *friendly* memorandum only, and not a legal act, under Rule 214, Art. 1 (*ante*, § 1878).

(2) An agreement made *subsequently* to the execution of the document, valid under Art. 5 (*post*, § 1938).

(3) An understanding that the document shall not represent a legal act at all until some event shall have occurred as a *condition precedent*, under Rule 214, Art. 4 (*ante*, § 1888).

Illustrations. (1) A street contractor negotiating with a city official signs a bond, on the understanding that it is not to be enforced but is to be used merely to satisfy the rules for bidders and to deceive an auditing committee; the understanding would be legally ineffective under the present rule; but it might deprive the bond of validity under Rule 214, Art. 1.

(2) A bond having been executed in a sum found later to be insufficient, a new bond is later given for the same transaction, on the understanding that the old bond, now mislaid, shall be cancelled when found; it is then found, but not cancelled. In a suit upon it, the understanding is material and effective, though, as a matter of procedure, there may be a difference between chancery and common law.

(3) In *Illust. (1)* above, the contractor signs a bond absolute and files it with his bid, on the understanding that it is not to become binding if the bid is not accepted by the city; this understanding is effective to defeat an action on the bond, in so far as it can be regarded as a condition precedent under Rule 214, Art. 4.

Cross-reference. For *negotiable instruments*, see *Par. (g)*, (*post*, § 1934a).

1932 *Par. (d).* Any document is presumed an exclusive memorial with reference to any appurtenant agreement

10

11

(1) as to *time* or *mode of payment*;
but not

(2) as to *counter-claim, set-off, or renewal*.¹ — (W. § 2436.)

1933 *Par. (e).* A document of conveyance is not presumed an exclusive memorial as to an appurtenant agreement that the grantee shall hold the property

(1) as a *security* only,

(2) or, as a *trust* only. — (W. § 2437.)

1934 *Par. (f).* A document is [not] presumed an exclusive memorial with reference to an appurtenant agreement that the right or the obligation shall be available, for one of the parties,

(1) as *surety* only,

(2) or, as *agent* only. — (W. § 2438.)

1934a *Par. (g).* *Negotiable instruments*.² — (W. §§ 2444, 2445.)

1935 *Par. (h).* Other than as here specified, there is no presumption, the circumstances of each case being the source of decision.³ — (W. § 2442.)

1936 ART. 3. *Fraud.* Where a party's fraudulent intent is material, and not merely the fact of making a warranty or representation, the reduction to an exclusive memorial does not prevent the voidability of the act on the ground of a fraudulent intent. — (W. § 2439.)

1937 ART. 4. *Usage of Trade or Locality.* Where a *usage* or *custom* of *trade* or *locality* would ordinarily be implied as a term of a transaction, the reduction of some transaction to a single memorial does or does not prevent giving effect to the usage or custom, according as the parties do or do not intend to cover by their memorial the subject of the usage or custom, pursuant to the usual rules of Art. 2 above. — (W. § 2440.)

¹ Here the presumption is not of much practical value.

² It is useless here to deal with these.

³ This seems the best way to deal with the mass of the cases.

Illustration. A contract is made by an expert in factory machinery to work on the installation of new machinery from Jan. 1 to June 1. His failure to work on Sundays is made the ground of a refusal to pay. An agreement that Sundays should be excepted as non-workdays may be effective, and depends on the scope of the memorial, but equally whether agreed expressly in conversation or impliedly in trade usage.

1938 ART. 5. *Subsequent Agreements; Novation, Alteration, and Waiver.* The parties' reduction to a single memorial embodies only the legal act as then completed; hence, any subsequent act, oral or written, whose purport is to novate, alter, or waive the preceding act in whole or in part, is legally effective so far as the present rule is concerned; though it may be intrinsically invalid for lack of written formalities (under Rule 220, *post*, § 1950) or for reasons of procedure. — (W. § 2441.)

Illustrations. (1) The plaintiff signed shipping articles as a seaman; then, on boarding the vessel, he found a sail unseaworthy; he had then the right to abandon the voyage: an agreement then made by the ship not to use the sail was a new contract, which could be availed of, regardless of the shipping-articles.

(2) A house is leased, and the lessee enters; the land not proving extensive enough, he orally leases an adjacent piece from the same lessor without increase of rental; if this later agreement is by law required to be in writing, it is void; if not, it is effective to alter the original lease as to the area.

(3) The performance of a contract to erect buildings is interfered with by a financial panic; the contractor for a consideration obtains a promise from the obligee not to sue for five years; this is legally effective, and could be sued upon if the obligee should within the five years bring a suit; but whether it could be pleaded in defence or be used to obtain an injunction would depend on rules of procedure.

1939 ART. 6. *Effect limited to Parties.* The exclusive memorial supplants the parties' conduct and utterances, exterior to the document, so far only as to take away their effect as a legal act for the same purpose as the document, but leaves unimpaired their legal effect for any other purpose. Hence such other conduct and utterances may be given legal effect

- (1) as to the *same parties*, in other legal relations;
- (2) and, as to *other parties*, in any legal relation not controlled by the document. — (W. § 2446.)



Illustrations. (1) A passes over B's land; a deed by B to A has granted A a right of way for five years, but the period has elapsed. A's claim of a right of way, under an oral agreement for ten years, not five, would be disposed of by the terms of the deed. But A's defence of leave and license, in an action of trespass, could be supported by the oral license of B, except so far as B may have revoked it.

(2) A landlord grants the premises to M; afterwards he sues the tenant for rent due since the transfer. If an oral agreement between the landlord and M, reserving for six months the right to collect rentals, can be effective between those two persons, then it can be effective against the tenant in the landlord's action for rent; but if the deed of grant would exclude the oral agreement as between the former, then it does also between the latter; for the right to collect the rents is a single right, and if the landlord has parted with it to M, he no longer has it against the tenant.

ART. 7. *Burden of Proof.* In ascertaining whether a particular document has by intent been made the exclusive memorial, so as to take away legal effect from certain other conduct or utterances, the burden of proof as to producing the writing is as follows:— (W. § 2447.)

Par. (a). The party objecting to such conduct or utterance as immaterial, on the ground that there is an exclusive memorial, must so persuade the judge; and has the duty of introducing some evidence thereof, if he does not produce the writing for inspection.

Par. (b). If some evidence thereof is introduced, *i. e.* that some writing was made at the time concerning the general subject of that transaction, the duty of producing evidence that such writing did not cover the conduct or utterance in question shifts to the offering party, *i. e.* until he produces the writing, from his own custody or that of a third person, the writing is presumed to be exclusive.

Par. (c). For the purpose of *Par. (b)*, *i. e.* of introducing some evidence as to the writing, the evidence suffices if it is obtained by the direct examination of the offering party's witnesses [or by their cross-examination by the objecting party].¹

¹ The bracketed clause is denied by some, but not with reason.



RULE 218. *Compulsory Integration of Private Parties' Acts.*

1944 Where by legal policy or by statute the acts of private parties, to be valid, are required to be embodied in a single memorial, other acts and utterances, whether oral or written, are immaterial, pursuant to the foregoing principles of Rule 217, after the memorial has been made; and, further, they are of no legal effect even though no such memorial is made.

Distinguish a rule merely requiring writing as a formality, under Rule 220 (*post*, § 1950); in such case the writings may be numerous and conflicting in terms; *e. g.*, wills of personalty had formerly to be in writing, but any number of pieces of writing, fragmentary and inconsistent, might satisfy that formality; now, however, the writing must be a single document containing all the terms; this is a requirement of compulsory integration.

ART. 1. *Kinds of Documents.* No general rule requires the
1945 acts of private parties in general to be reduced to a single memorial. Any rule so requiring is limited to some specific class of transactions, and therefore is a specific rule in the law of that subject, as defined in Rule 213, Art. 1 (*ante*, § 1872).¹
— (W. §§ 2451, 2452.)

They are as follows: ²

- (1) Wills;
- (2) Ballots;
- [(3) Insurance policies;]
- (4) Negotiable instruments;
- [(5) Corporate acts;]
- [(6) Corporate proceedings.]

RULE 219. *Compulsory Integration of Public Officers' Acts.*

1946 Where by legal policy or by statute the act of a public officer, to be valid, is required to be embodied in a single memorial, other acts and utterances are immaterial and without legal effect, in the same way as provided for the acts of private parties in Rule 218. — (W. §§ 2450, 2453.)

ART. 1. *Kinds of Documents.* No general rule requires the
1947 acts of public officers to be reduced to a single memorial. Any rule so requiring is limited to some specific class of acts,

¹ These of course cannot be here stated in detail.

² The first three by statute; the last three by common law.

and is therefore a specific rule in the law of that subject, as defined in Rule 213, Art. 1 (*ante*, § 1872).¹

They are as follows:

- (1) A judge's judicial act;
- (2) A petit jury's verdict;
- (3) A grand jury's indictment;
- (4) A legislature's vote;
- (5) Sundry officers' acts.

Distinguish the principle of testimonial conclusiveness, under Rule 133, as applied to a *magistrate's report of testimony* (Art. 2, *ante*, § 902), to a state secretary's *certificate of enrollment of a statute* (Art. 3, *ante*, § 903), and to *sundry official certificates* (Art. 5, *ante*, § 905).

Illustrations. (1) A sheriff's calendar records his orders, doings, and appointments. A record of appointment of a deputy is an act of his, and under the present principle the question arises whether it supplants as an exclusive memorial his oral appointment. But his entry of the date of arrival or of escape of a prisoner is a statement by him as to an external occurrence, and the question arises under the principle of testimonial conclusiveness whether the actual date can be shown by other testimony in contradiction of the sheriff's entry.

(2) A magistrate's order holding an accused to the grand jury is a judicial act of his, and the record-entry supersedes his oral utterance, under the present principle. But his written report of a witness' testimony on the hearing is merely his statement as to the witness' utterance, and under the other principle the question arises whether his statement is conclusive or can be shown to be erroneous by others who heard the witness' words.

¹ No attempt can be made to include these here.

TITLE III: SOLEMNIZATION OF LEGAL ACTS

RULE 220. *General Principle.* A legal act, though enacted
1950 according to Rule 214, and integrated according to Rules
215-219, may still fail to be given legal effect, if it lacks a
formality required for validity. A formality is some attendant
circumstance over and above the expression and volition
required by Rule 214.

ART. 1. *Kinds of Formalities.* No general rule requires for
1951 legal acts in general any formality. Any rule so requiring is
limited to some specific class of acts, and is therefore a specific
rule in the law of that subject, as defined in Rule 213, Art. 1
(*ante*, § 1872).¹

They are of the following sorts:

- (1) Writing; or signature;
- (2) Seal; or stamp;
- (3) Public registration;
- (4) Attestation by witnesses.

¹ It would be of course out of place here to include these.

TITLE IV: INTERPRETATION OF LEGAL ACTS

RULE 221. *General Principle.* For the purpose of giving
1953 effect to a legal act, by enforcing upon the external objects
the legal consequences provided in its terms, the objects in
the external world which are to be affected by those terms
must be ascertained. The process of thus ascertaining and
applying its terms to external objects is called Interpretation.

For this purpose the terms of the act are regarded as
marks or symbols, used by the actor to signify, to the officers
of the law, those external objects to be thus affected. The
object of the process of Interpretation is therefore to ascer-
tain the external significance of those marks or symbols as
used by the actor. — (W. § 2458.)

ART. 1. *Stages of Interpretation.* The process of interpre-
1954 tation has two parts or stages.

The first determines the *standard* of usage, i. e. among the
various classes of *persons* whose customary use of words
makes known the significance of words, it selects that person
or class whose usage shall or shall not control.

The second determines the *sources* of interpretation, i. e.
among the various *forms of conduct and utterance* which
exhibit usage of words, it determines those which may or may
not be used to ascertain it.

ART. 2. "*Meaning*," "*Intention*," "*Sense*," "*Volition*."
1955 The words "meaning" and "intention" being ambiguous,
the following words are herein used in their stead:

(1) "Sense" signifies the fixed association between the
uttered word in the legal act and some external object.

(2) "Volition" signifies the will to utter a specific
word as a term of the legal act. — (W. § 2459.)

Par (a). In the present rule, the *sense* of the words
1956 found in a legal act is the constant object to attain. But

the actor's *volition* to put those words into the act is here immaterial; its legal effect is governed solely by Rule 214 (*ante*, § 1877). Therefore, the present process of interpreting the sense of the words must avoid a violation of Rule 214, in so far as that rule declares void and immaterial the volition to utter words different from those actually expressed.

Illustration. A street-contractor signs a bond, providing for faithful performance, and naming as obligee "the mayor of Townville." Whether his mistake in intending to make his bond, as called for in the bid, to the superintendent of public works, not the mayor, is material, depends on Rule 214; but whether "the mayor" is to be applied to the individual then mayor or to any successor in office, depends on the present rule.

SUB-TITLE I: STANDARD OF INTERPRETATION

RULE 222. *General Principles.* The ultimate standard of 1958 interpretation is the sense employed by the party or parties doing the legal act.

1959 *Par. A.* In ascertaining this ultimate standard, the usage of some class of persons which includes the party to the act may be employed as a *provisional standard*.

For this purpose the species of usage are classified as follows:

(1) *General usage*, i. e. that of the *community* in general in which the tribunal sits;

(2) *Special usage*, i. e. that of any *group* of persons having peculiar habits of speech, as, a trade, art, or profession, a locality, an alien colony, a dialect;

(3) *Personal usage*, i. e. that of *specific persons*; which may be either

mutual, i. e. that of both parties to a bilateral act; or,

individual, i. e. that of one party, whether in a bilateral or a unilateral act.

1960 *Par. B.* In resorting to these species of usage, the following cardinal principles apply: — (W. § 2461.)

(a). The resort to either *general* or *special usage* ((1) and (2) above) is always *provisional* only, and serves



as a means of attaining (not of supplanting or of competing against) the ultimate standard, namely, the sense actually used by the party or parties to the act.

(b). In every case, the *general* usage is first taken as the provisional standard.

(c). *Before adopting any sense variant from that of general usage*, the Court must be persuaded

(1) that such sense exists in some special or personal species of usage, and

(2) that the party was employing that other species of usage.

(d). In a *bilateral* act, the mutual standard of usage controls as against the individual standard.

1961 ART. 1. *Rule as to Disturbing a Plain Meaning.* In applying the rule of Par. Ba above, the sense supplied by general usage, and provisionally adopted, must be rejected, as soon as it is made to appear that there exists some other sense in a special or a personal usage which was followed by the party or parties in the particular case;

(1) [unless the terms of the document have a meaning so plain as to need apparently no other than the general usage for their correct interpretation.]

(2) [unless the terms of the document are free from any doubt or ambiguity, either in themselves or in application to external objects.] — (W. §§ 2462, 2463.)

Illustrations. (1) A will bequeathed a legacy to "Samuel Powell, son of Samuel Powell of Philadelphia, carpenter." There were two sons of S. P., one going by the name of Samuel, the other by the name of William. The former was by a second wife, and was unknown to the testator; the latter was by a first wife, the testator's daughter, and was always called "Samuel" by the testator. The bequest goes to the son called "Samuel" by the testator, regardless of the general usage to apply that name to the other.

¹ The main article represents the sound rule; the bracketed clauses representing varying phrasings of an unsound limitation. This limitation is accepted, nominally at least, in many or most Courts, for some classes of documents, particularly for wills. But no Court accepts it to the extent of refusing to recognize a special usage of a trade or locality.



(2) A testator bequeathed "all my personal estate" to M; in several schedules of property drawn up by him from time to time, he regularly included certain leaseholds and certain interests in his wife's estate, under the heading "personal estate," while another heading itemized his "real estate;" this personal usage controls, regardless of the general or technical sense of "personal estate."

(3) A contract of mining for asphaltum provided a scale of payment for "each ton of asphaltum"; in the former transactions of these parties, as contained in bills and letters, "ton" signifies 2240 pounds; this sense will be applied in the contract, regardless of any definition given for general usage in dictionaries or statutes.

(4) A contract called for delivery of a quantity of "white arsenic"; the substance offered to be delivered was black in color, the hue being produced by lamp-black mixed in the course of manufacture; but by trade usage the term "white arsenic" is employed for that mixture; the contract is therefore satisfied by delivery of it.

(5) A broker wires a contract to buy "steel"; by cipher code with his correspondent, "steel" means "wheat;" the contract will be interpreted as "wheat."

ART. 2. *Special Usage.* In applying the rule of Par. Bc 1962 (*ante*, § 1960), by taking the special usage of a group of persons having peculiar habits of speech, it must appear

- (a) that such a definite usage of a class of persons exists;
- (b) and, that the party or parties presumably employed it (1) either because of belonging in that group of persons, (2) or because of knowing the usage and considering it appropriate in the transaction in question. — (W. § 2464.)

Illustrations. (1) Under a policy of insurance for a voyage to "any port in the Baltic," the ship was lost in the gulf of Finland; the ordinary maps of geographers mark the gulf and the sea as separate; but the sea may be taken to include the gulf, if it appears that the nautical and marine insurance trade has a definite custom of so treating it in trade discourse and conduct.

(2) In a policy of insurance issued in New York, the cargo of "coal" is limited to a certain quantity; at Cardiff where the coal was loaded, a kind of coal-dust briquette is by usage not included in "coal"; the Cardiff usage will apply if the parties are all Englishmen dealing on English tradal methods, or if they are Americans customarily employing Cardiff tradal phrases in similar transactions.

Distinguish (1) the question whether a usage which supplies an implied term of the contract must be rejected under Rule



217, Art. 4 (*ante*, § 1937) because the document, as the sole memorial of the transaction, has already covered the subject of the usage.

(2) the rule that a usage must be proved by a sufficient number of witnesses (Rule 179, Art. 6, *ante*, § 1514).

1964 *Par. (a).* If the special usage was known to one party only in a bilateral act, and not to the other, Art. 4, Par. (b), below, applies.

1965 *Par. (b).* If the special usage varies from the plain meaning in general usage, Art. 1, above, applies.

1966 **ART. 3. Mutual Usage.** In applying the rule of Par. Bc (*ante*, § 1961), by taking the personal mutual sense of the parties to a bilateral act,

1967 *Par. (a).* If one party seeks to enforce, as the mutual sense, a special usage, peculiar to a group of persons, but not known to the other party, Art. 4, Par. (b) below, applies.

1968 *Par. (b).* If the mutual usage varies from the plain meaning in general usage, Art. 1, above, applies.

1969 *Par. (c).* If the mutual sense is sought in the parties' conduct and utterances expressing their intent as to the particular transaction, Rule 223, Art. 1 (*post*, § 1976), applies.

1970 **ART. 4. Individual Usage.** In applying the rule of Par. Bc (*ante*, § 1960), by taking the personal individual usage of one of the parties to an act, the following rules apply: — (W. §§ 2466, 2467.)

1971 *Par. (a).* For a unilateral act, the individual sense of the actor alone controls; [subject to the rule of Art. 1, above, where the individual sense varies from the plain meaning in the general usage.]

1972 *Par. (b).* For a bilateral act, the consequence of Par. Bd, Art. 1, above, making the mutual standard to control, is that the sense to be enforced is determined as follows:

(1) First, the sense actually employed by both parties is taken, if identical.

(2) But if variant senses are employed, that sense is

taken which, being actually employed by one party, *should also have been supposed by the other party*, under all the circumstances as known to him, to be employed by the first party.

(3) And, if *neither sense* satisfies Clause (2) above, *i. e.* if neither sense, as actually employed, is the one which the other party should reasonably have supposed to be employed, then [the act is void, if the term to be interpreted is an essential part of the transaction; but otherwise¹] each party is chargeable with the sense actually employed by him, and with no other.

Illustrations. (1) In a cipher cablegram, the word "gloves" occurs; both sender and receiver have lost their copies of the private code, but by memory the receiver interprets this to mean "send purchases of silk by next steamer;" this also was the sense attached in the cipher code as remembered by the sender. The actual sense being identical, it is enforced, regardless of what the printed or written code contained; though in case of dispute of fact as to the actual sense of each party, it might have been difficult to ascertain the actual sense.

(2) An insurance policy covers "the premises at 160 Mott St.;" there are two buildings at that number, one in front, the other in the rear, both owned by the insured; the insurer does not know that there are two buildings, and supposes that there is only one; both are burned. The insured's sense, as actually employed for the word "premises," will control, as against the insurer's sense, if under all the circumstances the insurer should have supposed that "premises" included all structures not specifically described.

(2a) An illiterate purchaser sends the following order: "Please ship me one rite steel weel for a drill two square feeting shafts 4 ten hoe drills;" the manufacturer ships four ten-hoe drills; the buyer signified actually "two sq. ft. shafts for ten-hoe drills." The seller's sense controls, if it is deemed reasonable for the illiterate buyer to be charged with the sense which a literate seller in the trade would put on that order.

(3) The plaintiff sells cotton in London to the defendant, "to arrive ex Peerless from Bombay;" there are two ships Peerless sailing from Bombay, one in December, the other in October; each party knows of one ship only; each is chargeable only with the sense actually employed by him, and hence the plaintiff is not liable for refusal to accept delivery of cotton from the ship not signified by him. Perhaps also the contract is void, so that he cannot even demand delivery of cotton from the other ship if he so elects.

¹ Presumably some Courts go this far.

ART. 5. *Specific Rules for Specific Words.* For any class of 1973 transactions, specific rules of law may adopt specific senses for specific words, which senses are to be presumed to have been employed until some other sense appears to have been employed by the party or parties in a particular case.¹

Illustrations. "To A and his heirs" in a will; "river" in a farm-deed; "street" in city-deed; etc.

SUB-TITLE II: SOURCES OF INTERPRETATION

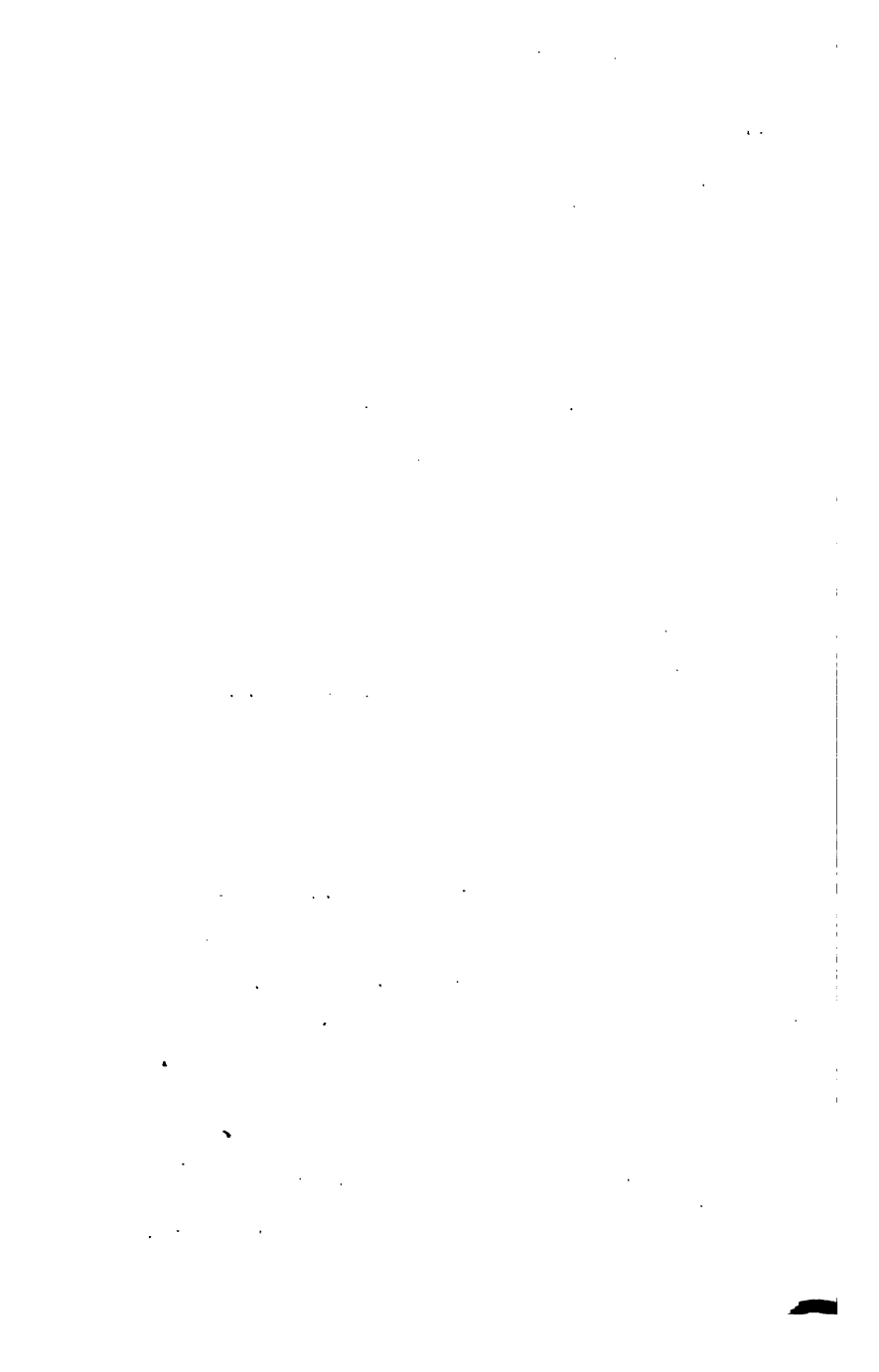
RULE 223. *General Principle.* For the purpose of ascer- 1975 taining the actual sense of terms, in any kind of document whatever, any and every circumstance may be considered, whether things or persons, conduct or utterances, words in the document or external to it, provided only the circumstance is likely in some way to disclose the association between the words as used in the document and the persons or things to which those words may by possibility be applicable; subject to the following qualifications: — (W. § 2470.)

ART. 1. *Statements of Intent, excluded.* In searching to 1976 ascertain the sense employed in the terms of a document, the present Rule yields whenever there is a substantial risk of violation of Rule 214, Arts. 7, 9 (*ante*, §§ 1897, 1911), declaring immaterial the party's mistake as to inserting certain terms, or of Rule 217, Art. 1 (*ante*, § 1921), declaring immaterial all conduct and utterances on the same subject and not reduced to writing in the document. Therefore,

No consideration is to be given, as a source for interpretation, to the party's *direct statement* of his own volition or intent as to the terms of a specific act or of the sense of the words as used by him therein. — (W. § 2471.)

Illustrations. (1) A will devises property "in the county of Limerick"; no property is found there; in fact, however, the testator owned property in the county of Clare, and the draft will, as drawn up by him and sent to the attorney, read "counties of Limerick and of Clare," and by a mistake of the attorney the phrase was changed; the change was apparently not noticed by the testator when the will was read over to him. This mistake may or may not avail, under Rule 214, to set aside or to correct the terms of the will. But if it does not, and the terms of the will are to be taken definitely

¹ This is the place where the various rules of thumb belong.



as "county of Limerick," then in interpreting these words the draft will, expressing the intention of the testator as to this transaction, cannot be considered.

(2) A contract for constructing a building specified "all sewer-connections with city-sewers." In drafting, the builder refused to accept this clause, and wrote a letter stating that in view of the high price of iron pipe he did not care to include that in his contract; by mistake he signed the contract with that clause still in it. Afterwards, a dispute arising as to the amount of a deduction to be made from the price, for failure to build the sewer-connections, the sense of the term "sewer-connections" comes in issue. For the purpose of interpretation, his letter refusing to insert the clause cannot be considered.

1977 *Par. (a).* Nevertheless, for the purpose of interpretation, and in particular of *identifying a person or thing described* in some term of the document, the conduct and utterances of the party or parties relating to the subject of the particular transaction may be considered, in so far as the foregoing Article is not substantially violated.¹ — (W. §§ 2466, 2468.)

Illustrations. (1) A will devises to children "two residences now occupied by my two children;" in fact there were two buildings, but they had been subdivided into three apartments each, and one apartment was occupied by each child. The testator's letters and conversations relating to the buildings may be used as exhibiting his usage of the word "residence" for those buildings, but not a letter specifically declaring his intent to devise the whole buildings to the children.

(2) A contract provides for the sake of "your wool"; the parties' conversations at the time of contracting may be used as applying the term "your wool" to specific lots of wool and to no other.

(3) A deed conveyed land "with the appurtenances"; there was a pasture, separated from the lot sold, but heretofore used in connection with it; the advertisement of sale had expressly excluded the pasture from the offer, and the buyer at the sale had said that he was not bidding for it; whether the pasture shall be regarded as included in the sale depends on whether we regard these external utterances as merely an interpretation of the term "appurtenances" or as virtually a limitation of the written description.

(4) A contract for advertising provides that the payment shall be made "as convenient"; the advertiser desires

¹ This distinction is generally recognised, though rulings vary in the emphasis put on one or the other rule.



to interpret this by letters of the parties, written at the time, stating their understanding that payment shall be made "as soon as sales are made through the circulation of the advertisement"; this is improper, because it involves not strictly an interpretation of the terms "as convenient," but a substitution of other terms.

1978 ART. 2. *Same; Exception for Equivocation, or Latent Ambiguity.* Direct utterances of intent, as defined in Art. 1 above, are admissible to interpret an equivocation, i. e. a term which, on application to a person or thing, is found to fit equally two or more. — (W. § 2472.)

Illustrations. (1) A will to "my nephew Joseph"; on application of this to the testator's nephews, there appear two bearing the name Joseph; any statement of the testator's intent may here be considered and given effect.

(2) A deed conveys the "Adams House"; there are two hotels in the city bearing that name; the parties' mutual intent, as exhibited in any statement of theirs, may be considered and enforced; but under Rule 222, Art. 3, Par. (c) (*ante*, § 1969) a statement of the individual intent of one of the parties could usually not be considered.

1979 Par. (a). A blank space in a document is not an equivocation, under the present rule, if it appears to represent, not the party's chosen mode of indicating his ignorance of the precise description, but his abstention from making a final expression of volition. — (W. § 2473.)

Illustration. A bequest of money to "my nephew's betrothed, Ella ——" would be of the former sort; but a bequest to "my old friend ——" would be of the latter sort.

1980 Par. (b). A term which is intrinsically *uncertain* or *repugnant* is not an equivocation.

Illustration. A devise of "one of my seven houses" may be void for uncertainty, or may permit an election; but it is not an equivocation.

1981 ART. 3. *Same: Exception for Misdescription.* Where a term of description, when applied to a person or thing, appears to fit no one exactly, but to fit one in one part and another in another part, the party's direct utterances of intent, as defined in Art. 1, above, may [not] be considered



for the purpose of interpreting the description.¹ — (W. § 2474.)

Illustration. A will devises property to "my well-beloved grand-nephews John and William"; the testator had two grand-nephews John and William, but they were personally unknown to him; he had also two grandsons John and William, of whom he was very fond; the testator's instructions to the attorney drafting the will may be considered.

1982 ART. 4. *Same: Exception for Rebutting a Presumption of Law.* Wherever by some rule of law a legal effect is made to attach to certain provisions in a document, and the rule purports to presume the intent of the party for lack of an expression of such intent, the party's utterances of intent, exterior to the document, may be considered; unless the rule by statute expressly so forbids.² — (W. § 2475.)

Illustration. A rule declares that a child not mentioned in his parent's will shall nevertheless receive his share as next of kin unless it appears that he was intentionally omitted from the will's provisions; the parent's oral statements of intent may be considered.

1983 ART. 5. *Misdescription in general.* Wherever a term in a document, when applied to possible persons or things, is found not to fit any one exactly in every item of the descriptive term, the term may be applied and enforced nevertheless, on considering all proper sources of interpretation, to such person or thing as is fitted by part of the items of description, provided those items

(1) appear to be the essential features of the description,

(2) and are sufficiently definite to be enforced.³ — (W. § 2476.)

Illustrations. (1) A deed carries a boundary to a "chestnut tree at the S. E. corner of George Williams' lot"; there is no such tree at the S. E. corner, but there is one at the N. E. corner; if the circumstances justify, the description may be applied to the tree as it is, ignoring the item "S. E."

(2) A will devises property to "my niece Sarah, now living with my sister Jane"; there is a sister Sarah, who used to live with sister Jane but does so no longer; there is also a sister Susan, who does live with sister Jane; the circum-

¹ Most Courts insert the "not"; but this is unsound.

² Not all Courts accept this in every application.

³ For wills, some Courts perhaps do not accept this.



stances will show which item of the description is the essential one.

Distinctions. (1) Where a description applies *exactly* in every item to one person or thing, and only in part to another, the rule against disturbing a clear meaning (Rule 222, Art. 1, *ante*, § 1961) may be deemed to stand in the way.

(2) Whether the misdescription occurred by *mistake in drafting* (as in Illust. (1) above) or by change of circumstances in lapse of time (as in Illust. (2) above), does not matter under the present rule. But an attempt to show the mistake in drafting would be ineffectual, under Art. 1 above; so that the interpretative result allowable under the present Article would be defeated if sought to be attained by the other and improper method.

(3) Whether, in interpreting the misdescription, the party's direct *statement of intent* can be considered, depends on Art. 3 (*supra*, § 1891).

1984

Par. (a). In applying the present Article to a devise of property in a will, the testator's description of property may [not] be taken in the sense of his own property, [unless express words of ownership are used in the description.]¹

¹ Some Courts accept the bracketed phrases, but too strictly.



BOOK II:

BURDEN OF PROOF, AND PRESUMPTIONS

(BY WHOM EVIDENCE MUST OR MAY BE PRESENTED)

TITLE I: GENERAL PRINCIPLES

RULE 224. *Judge or Parties may adduce Evidence.* (1) The 1990 procuring and presenting of evidence is ordinarily to be done by the parties to litigation (or their representatives) and there is no *duty* on the judge to act for that purpose, except to issue suitable orders of compulsion on request by the parties.

(2) But the judge is *entitled* to act of his own motion and to cause any evidence to be obtained and presented, and in particular, such evidence as appears to him to be available and desirable to supplement the evidence presented by the parties. — (W. §§ 2483, 2484.)

Illustrations. The judge may order the calling of a witness not called by either party; or may himself put additional questions to a witness called and examined by a party.

Cross-reference. For the rule as to a *judge's questions*, see Rule 92, Art. 6 (*ante*, § 474).

Distinguish the rule that a judge may not comment to the jury *on the credibility of testimony* (Rule 5, Art. 5, *ante*, § 16), which serves to restrict the judge's free use of questions.

[ART. 1. *Judge may summon Expert Witnesses.* In any 1991 case where a witness of special experience is admissible under Rule 83 (*ante*, § 377), the judge may summon as such witness one or more persons selected by himself, with or without the prior nomination of the parties, and such witnesses shall be notified to the jury as having been summoned by the judge; but their testimony shall be subject to cross-examination



and impeachment by either party pursuant to Rule 96 (*ante*, § 500) and Rule 134 (*ante*, § 910).]¹ — (W. § 562.)

1992 [Par. (a). Such witnesses shall be entitled to an opportunity to *inspect* any person, place, or thing of which inspection could be demanded by the opponent *before trial* under Rule 161 (*ante*, § 1325), and may be ordered by the judge to inspect and report at the trial about any person, place, or thing of which a *view by the jury* could be ordered under Rule 123 (*ante*, § 730).]²

Cross-references. (1) For the provision that the *number of expert witnesses* examined by the parties may be *limited* by the judge, see Rule 167 (*ante*, § 1400).

(2) For the *fees* of expert witnesses, see Rule 199 (*ante*, § 1680).

1994 RULE 225. *Parties' Burden of Proof; General Principle.* Since the judge is empowered, under Rule 229 (*post*, § 2100), to decide upon the sufficiency of evidence to the extent of withdrawing from the jury's deliberations the case of a party upon any issue not sufficiently evidenced to be worth submission to the jury, and since the jury is empowered to determine the issues when submitted to it by the judge, there are to be apportioned to the parties two kinds of burden or liability in respect to adequacy of evidence upon a given issue; namely,

(1) the duty of *passing the judge* by *introducing such evidence* on a given issue as shall be *ruled by the judge* to be sufficient for submission to the jury (Rule 226);

(2) and, the risk of *not persuading the jury*, so as to remove doubt, by such evidence as shall be so submitted to it (Rule 227). — (W. §§ 2485, 2487.)

1995 ART. 1. *Difference in Legal Effect of the Two Burdens.* (1) The effect of the *duty of passing the judge* is that the party having it and not fulfilling it is by a *ruling of law from the judge*

¹ This Article is as yet law in two States only; it represents a broader re-casting of a statutory innovation in those States, which promises to solve the problem of the abuses of expert partisanship.

² This Paragraph is only partly represented in the above-named statutes.



then and there precluded from further contention of that issue.

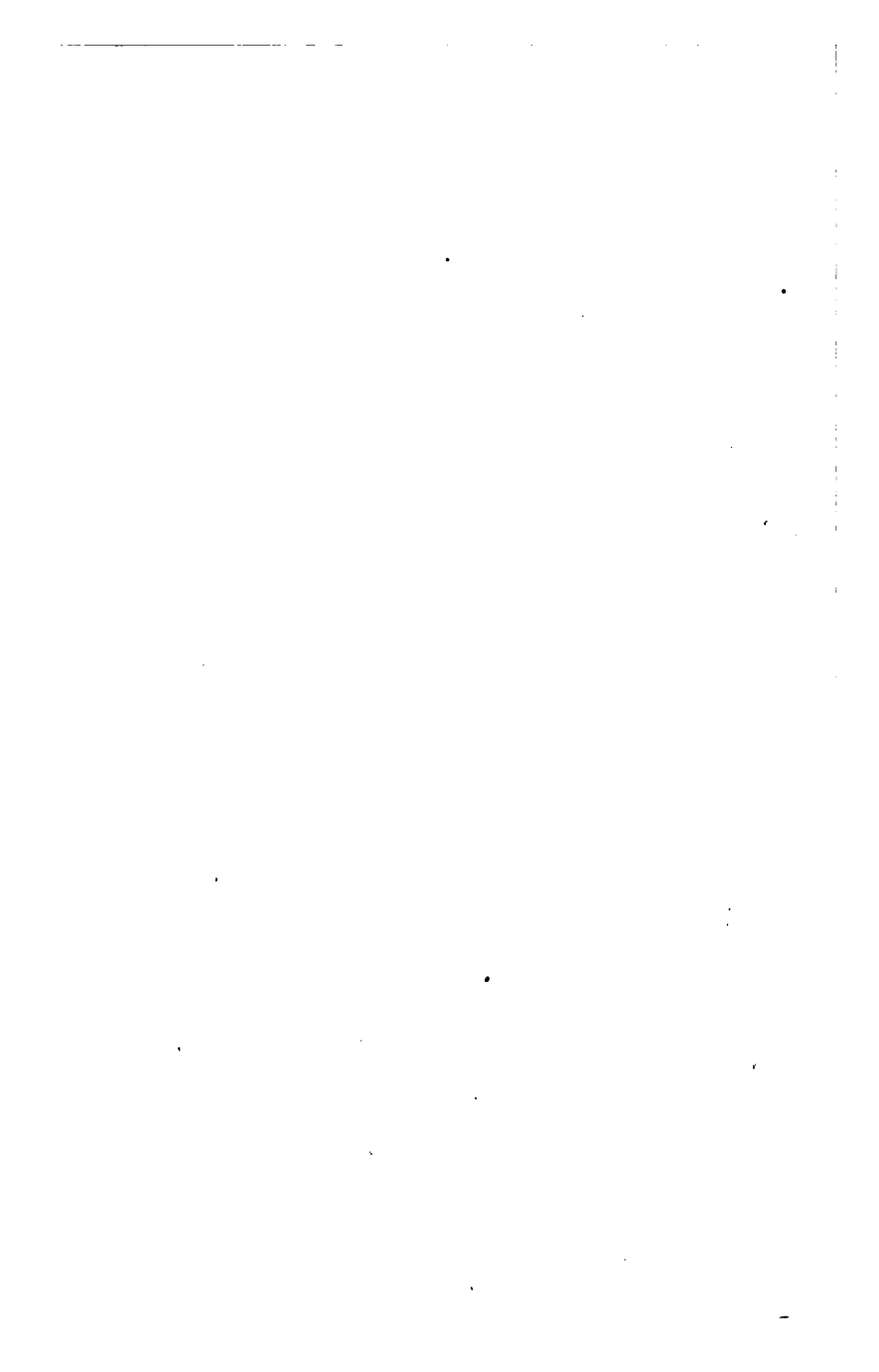
(2) The effect of the *risk of jury-doubt* is not that the party having it is precluded from contention of that issue, but that after the evidence is closed he has the *risk, if any in fact*, that the rule of law fixing a standard of persuasion for the *jury* may result in an adverse finding, *i. e.* the rule that the jury, if not fully persuaded by either party but remaining in doubt on the evidence submitted by both parties as to that issue, must find adversely to his contention, and not adversely to the other party's contention.

Illustrations. (1) In an action on a promissory note, with a plea of non assumpsit, the plaintiff introduces the note, with a letter purporting to admit its execution and to promise payment, and with testimony to the handwriting of the defendant. The judge rules that this is sufficient evidence to justify submission to the jury, and thus the duty of passing the judge is fulfilled. The risk of jury-doubt is then on the plaintiff; the actual risk for the plaintiff that such doubt will result is small, if the defendant introduces no evidence, and is great for the defendant; but if the defendant introduces testimony that the handwriting of the note is not his and that the letter referred to another note, and if in consequence of this the jury feel unable to determine which contention is correct, the rule of law requires them to decide against the plaintiff.

(2) On a plea of payment, in an action for money loaned, the defendant has the duty of passing the judge and also the risk of jury-doubt. He testifies that he enclosed paper-money in a registered envelope and sent it to the plaintiff; this may suffice to fulfil the duty of passing the judge. The plaintiff then testifies that he received such an envelope but it contained no money. If the jury cannot make up their minds whether the money was ever sent or ever arrived, they find against the defendant on the plea of payment; the risk of this result of the rule of law for doubt being on the defendant, although each party had the actual risk of the jury fully believing the other party.

1997 **RULE 226. *Duty of Passing the Judge.*** (1) The duty of passing the judge is a duty to introduce evidence, on a particular issue, which makes a case at least plausible enough to be worth submission to the jury. This duty, in being satisfied, may leave both parties without any duty.

(2) But the evidence then or later introduced may also be of such probative value as to create the duty anew for the



opponent. If then also satisfied, both parties may again be without such duty.

(3) If by either party, when he has the duty, it is left unsatisfied, the judge by ruling of law precludes further contention of that issue on his part, by making such order or giving such direction to the jury as is appropriate, in favor of the other party.

(4) The duty is therefore on one party only at one time, but after fulfilment by either it may shift to the other party, or may cease; and if unfulfilled by either, the issue is closed as matter of law. — (W. § 2487.)

ART. 1. *Primary Incidence of the Duty.* The duty falls in 1998 the first instance on the party who by the pleadings and by Rule 227 (*post*, § 2022) has the risk of jury-doubt.

Illustrations. In an action for personal injuries caused by negligence, with a plea of not guilty, the plaintiff has by the pleadings the risk of jury-doubt on that plea; he therefore also has the duty of passing the judge. But in an action for money loaned, with a plea of release, the defendant by the pleadings has the risk of jury-doubt on that issue, and has therefore also the duty of passing the judge, by adducing some evidence as to the release.

ART. 2. *Modes of Satisfying the Duty; Sufficiency and De-* 1999 *cisiveness.* The duty may be discharged

(1) by merely satisfying it;

(2) or by satisfying it and at the same time shifting it to the opponent.

(1) Evidence which merely satisfies it is said to be *sufficient* (to go to the jury).

(2) Evidence which is so persuasive that it ought not only to be considered by the jury but to control their verdict for that party is said to be *decisive*,¹ and shifts the duty to the opponent.

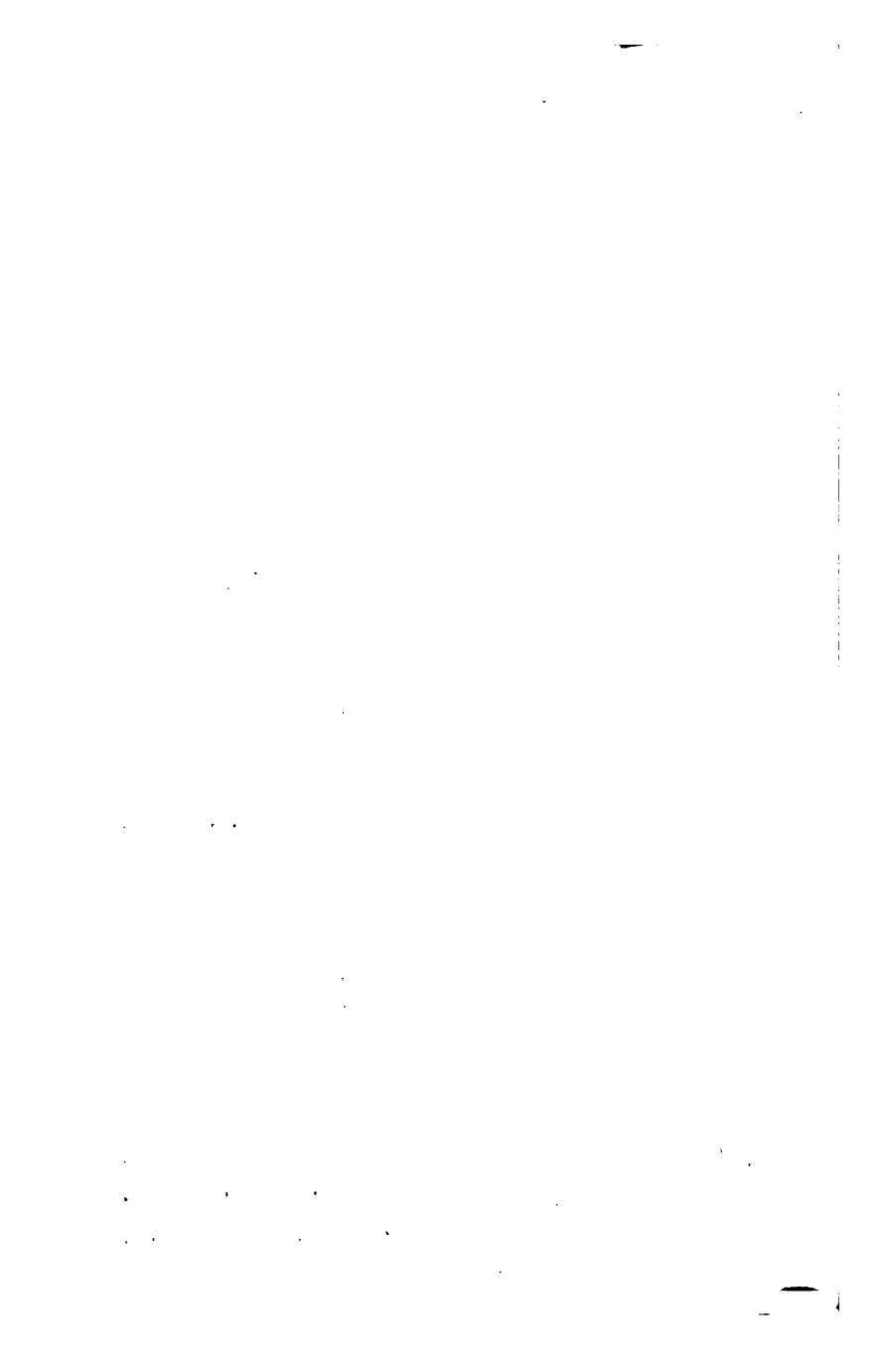
In both cases the judge's ruling may be made

(a) either under a *general rule*,

(b) or, on the *particular evidence* in that case.

The four kinds of rulings are therefore as follows:

¹ There is in practice no such term. But the process must have a term, if there is to be any intelligible discussion or legislation.



(1) (a) If some *general rule of law* as to the sufficiency of a specific class of evidence is applied, there is said to be a *sufficiency by rule of law*.¹

(1) (b) If in the evidence in the *particular case*, regarded as a whole, a sufficiency is found, there is said to be a *sufficiency by ruling on the case*.¹

(2) (c) If some *general rule of law* as to the conclusive effect of a specific class of evidence is applied, there is said to be a *presumption of law*.

(2) (b) If in the evidence in the *particular case*, regarded as a whole, a conclusive effect is found, there is said to be a *decisiveness of evidence on the case*.^{1 2}

Illustrations. (1) (a) In an action for injuries from the bite of a vicious dog knowingly kept, evidence of a single former instance of biting, known to the defendant, may be a *sufficiency by rule of law* to evidence the viciousness and the knowledge of it. In an action of ejectment, the plaintiff's title resting on a grant in 1864, the appearance of a document purporting to be a deed of that date, found in his grandfather's garret, may be a *sufficiency by rule of law* to evidence the genuineness of the deed, without other evidence.

(1) (b) In the action for injury by the bite of a dog, the plaintiff's evidence may be that the dog bit him, and that he complained to a policeman, and nothing more; and as to the *scienter* the judge may here find that there is not a *sufficiency by ruling on the case*.

(2) (a) In the action of ejectment, the recorded deed of an ancestor being offered, without evidence of its delivery, the judge may rule that there is a *presumption* of delivery, from the fact of recording; this will shift the duty to the opponent to pass the judge by some evidence of non-delivery, and for lack of such evidence the jury must conclude there was a delivery.

(2) (b) In an action of ejectment, where the plaintiff claims under an ancestor Jeroboam Castro, of Carterville, and introduces a deed of 1864 to Jeroboam Castro of Carterville, and the defendant, maintaining that the said C. was dead at the time, introduces merely a register of the Confederate Army, in 1863, with an entry of the death of one Jeroboam Castro of Champaign, the judge may on this and the rest of the evidence find that there is a *decisiveness of evidence on the case* in favor of the plaintiff on this issue.

¹ These phrases are not technically so used in practice; but some conventional phrases must be adopted.

² Some Courts ignore this kind of ruling, Art. 5, Par. (b), *fra*, § 2009).



ART. 3. *General Test for Sufficiency and Decisiveness by*
2002 *Ruling on the Case.* The tests to be used by the judge in
rulings on the case are as follows:

Par. (a). The test for *sufficiency by ruling on the case*
is whether the *proponent's* evidence

[is so slight that a favorable verdict based upon that
evidence alone would appear incomprehensible as a
matter of reasoning.]

[is more than a scintilla in value.]

[is so weak that a favorable verdict based on it would
necessarily be attributable to passion or partiality.]

[is such as might conceivably justify men of ordinary
reason and fairness in finding for the proponent.]

[is so slight that a favorable verdict would afterwards
require to be set aside for lack of appreciable evidence
to sustain it.]¹ — (W. § 2494.)

2003 *Par. (b).* The test for *decisiveness by ruling on the*
case is the same as for sufficiency, except that it is applied
to the *opponent's* case.²

ART. 4. *Specific Rules of Law for Sufficiency.* The rules of
2004 law for *sufficiency* in specific classes of issues are found

(1) In the provisions of Rules 178-189 (*ante*, §§ 1500-
1643); wherever therein a certain kind or quantity of evi-
dence is declared necessary on a particular issue, it is also
sufficient to go to the jury.

(2) In the provisions of Rule 228 (*post*, § 2035); wherever
therein a certain class of facts is declared to raise a presump-
tion, it also imports a sufficiency; and where it does not raise
a presumption, it may nevertheless there be declared to be a
sufficiency.³

¹ Courts vary in their phrasings. The first bracketed
clause above is novel, but attempts to reconcile and improve
the current phrasings.

² But where the last form in *Par. (a)* is in vogue, the phrase
"against the overwhelming weight of evidence" should here
be substituted.

³ For Code purposes the rules of presumption and of suffi-
ciency must be placed together, classified according to the
kind of issue.



ART. 5. *Specific Rules of Law for Presumptions.* The tests for *presumption of law* in specific issues are placed under Rule 228 (*post*, § 2035), classified according to the kind of issue.

ART. 6. *Assuming Credibility of Testimony in Rulings upon Sufficiency or Decisiveness.* In making rulings upon sufficiency or decisiveness, whether on the case or by rule of law, since the judge must avoid exercising the jury's functions of determining the credibility of testimony, the ruling must *assume such credibility in favor of the party against whom the ruling is made.* — (W. § 2495.)

In particular,

Par. (a). In a ruling on the proponent's *sufficiency* of evidence, whether on the case or by rule of law,

(1) the credibility of the *proponent's* testimony *must* be assumed;

(2) the credibility of the *opponent's* testimony *may* be assumed

1. in *every case*, for the purpose of declaring, as against him, that the evidence is *sufficient*.

2. or, so far only as *undisputed*, for the purpose of declaring, in his favor, that the evidence is *insufficient*.

Illustration. (1) In an action for injuries caused by negligently starting a car before the plaintiff had alighted, the plaintiff's testimony is (1) that he had not alighted when the car was started; this the conductor denies; the conductor further testifies (2) that the bell was rung before the car started, and (3) that he had told the plaintiff to hurry, before the bell was rung; on the former point the plaintiff agrees. On a ruling as to sufficiency, the judge must assume the truth of the plaintiff's testimony as to (1); the judge may also assume the truth of (2), if he rules for insufficiency; he may assume the truth of (3), if he decides for sufficiency on the facts.

(2) On an issue of delivery of a deed by the deceased, the proponent's testimony stating that the deed was in the deceased's handwriting and was found in the grantee's bank-box, the truth of this testimony must be assumed, in applying any rules as to sufficiency by rule of law.

Par. (b). In a ruling on the proponent's *decisiveness* of evidence, whether on the case or by presumption of law,



(1) the credibility of the *opponent's* testimony *must* be assumed;

(2) the credibility of the *proponent's* testimony *may* be assumed

1. in *every case*, for the purpose of declaring, as against him, that the evidence is *not decisive*;

2. or, so far only as *undisputed*, for the purpose of declaring, in his favor, that the evidence is *decisive*.

Illustration. (1) In an action for injury caused by the derailment of a car, the defect of the axle is conceded, and the sole contention is that the defendant's agents had used due care in inspecting it and could detect nothing; the car inspector testifies to a record of inspection of axles 4417-4427, including the car 4419, the one in question, and admits that there was no inspection of car 4497; by undisputed testimony the plaintiff then shows that car 4497 was the one derailed and had been in the car-house unused for six months until that day. The judge may rule that the evidence of lack of inspection of car 4497 is decisive on the case.

(2) On an issue of death, the proponent's testimony being that the person left home ten years before and has since not been heard from by any one, a ruling applying the presumption of law must not assume the truth of this testimony, and must therefore instruct the jury to apply the rule if they believe the facts as testified to for the proponent.

ART. 7. *Form and Effect of Ruling upon Sufficiency or*
2009 *Decisiveness.* A ruling upon sufficiency or decisiveness may have the *effect*

(1) of precluding further contention in *that case only*, — under the term "nonsuit" or otherwise;

(2) or, of precluding further contention in *any proceeding*, — under the term of "direction of a verdict" or otherwise.

A ruling may in *form* be

(1) an *order entered* by the judge,

(2) or, an *instruction* or a *direction* by the judge to the jury. — (W. § 2495.)

2010 *Par. (a).* A ruling upon the proponent's *sufficiency* of evidence, whether on the case or by rule of law,

(1) If *against him*, [may direct a *verdict for the opponent*, or] may direct a nonsuit, or may strike out a plea.¹

(2) If in *his favor*, enables him to pass the judge and

¹ A few Courts deny the bracketed clause, but unsoundly.

ask the jury's verdict; subject only to the renewal of the motion as provided in Art. 8 below.

2011 *Par (b)* A ruling upon the proponent's *decisiveness of evidence on the case*,

(1) If in his favor, in a civil case, may *direct a verdict for the proponent*; ¹ but in a *criminal* case it may not direct a verdict for the prosecution.

(2) If *against* him, leaves him entitled to ask the jury's verdict.

Illustration. In an action for negligent injury, with affirmative plea of contributory negligence, the defendant being the proponent on that plea, a verdict may be directed for the defendant, on the conclusiveness of the evidence of contributory negligence; always observing the rule of Art. 6, Par. (b) (*ante*, § 2008), that the credibility of the opponent's testimony, i. e. the plaintiff's, must be assumed.

2012 *Par. (c).* A ruling upon the proponent's *decisiveness by presumption of law* may, if in his favor, [in a civil case, but not in a criminal case in favor of the prosecution²] *instruct the jury*, in reaching the verdict, to find as true the fact presumed by law from the fact evidenced, or, if that presumed fact is the sole fact in the issue, *direct a verdict*

(subject to the rule of Art. 6, Par. (b) (*ante*, § 2008) as to assuming the credibility of testimony). — (W. §§ 2490, 2491.)

Illustration. (1) In an action of ejectment, B claiming as heir of M now deceased, the title of the plaintiff depends on three main facts (1) M's title, (2) B's heirship, (3) M's death. If the plaintiff's testimony is that M has been absent for ten years unheard from, the judge will instruct the jury that in reaching their verdict they *must* take M to be deceased, if they believe that testimony. Nevertheless, the judge cannot direct a verdict, because the other two facts essential to B's title may be found against him, even though M is found to be deceased. If the sole issue were the fact of M's death, the judge might direct them to return a verdict for B, if they believe the testimony as to M. If that testimony were undisputed, and no other fact were in issue, the judge might direct a verdict for B.

¹ Some Courts deny this, but not soundly.

² Most Courts enforce the bracketed limitation.

2013

Par. (d). A *presumption of law* being only a ruling of the judge declaring that the duty of passing the judge has shifted to the opponent (Art. 2, *ante*, § 1999), the opponent is still entitled to fulfil that duty by introducing sufficient contrary evidence to pass the judge.

Therefore,

(1) In ruling upon a presumption of law *before the close* of the case, the judge must state that the presumption is subject to be so removed.

(2) In ruling upon evidence introduced *before the close* of the case for that purpose of *removing the presumption*, the judge must observe the rule of Art 6, Par. (b) (*ante*, §2008) as to assuming the truth of the testimony.

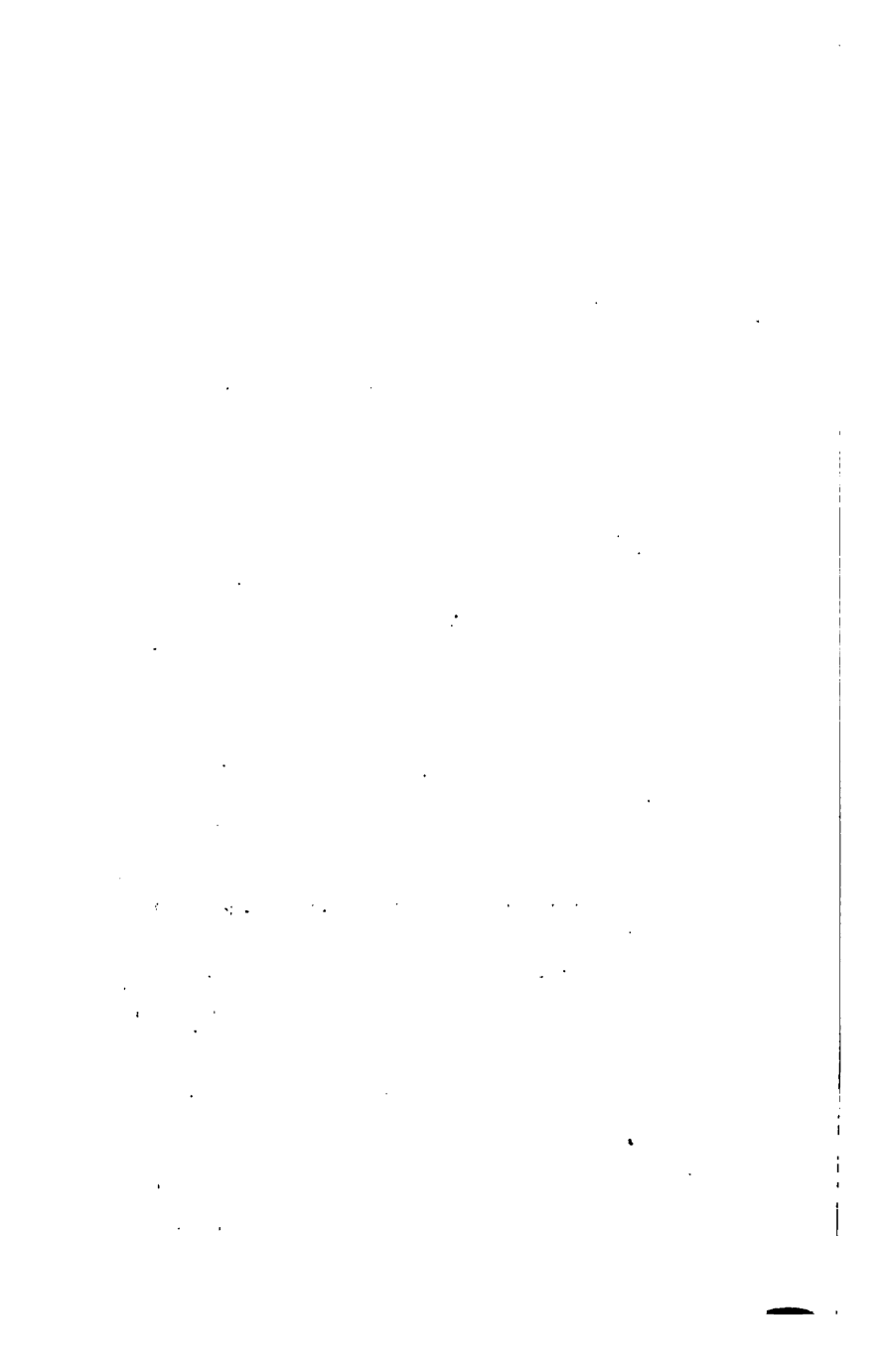
(3) In ruling upon a presumption *after the close* of the case, the judge must *instruct the jury* that the rule of presumption does not control them if they believe the testimony of the opponent denying the facts which would create the rule of presumption, or adding new opposed facts.

[(4) If the jury, after such instruction, find on testimony believed by them that the facts are not precisely those which create the presumption as a rule of law controlling them, they are *no longer to observe it as a rule of law*, but only as a maxim of experience, and are to weigh all the facts on both sides, subject only to the rules as to jury-doubt in Rule 227 (*post*, § 2022).]¹

Illustration. (1) On the issue of the death of M, in *Illust. (1)*, Par. (c) above, the proponent introduces his testimony to M's absence, and rests. The judge rules that by presumption of law M is dead, if that testimony be believed. The opponent then introduces a letter from M in Australia, dated a year ago, and telling of his prosperity; this letter the proponent maintains to be a forgery. The judge would rule the letter to be sufficient to remove the rule of presumption, but he cannot assume its genuineness as against the proponent. The case is submitted to the jury, with instructions to find

¹ This is the orthodox rule; but some Courts give a vague extra force to the presumption.

There is here much room for vain quibbling; it would be an improvement if Courts would avoid trying to enforce the theory of presumptions in the actual handling of cases. The rules should never be allowed to become the masters, but should be merely servants to help in solving real doubts and cutting short futile speculations.



the fact of death, by presumption of law, if they believe the letter not genuine; and if they believe it genuine, to weigh all the facts and reach their belief controlled by no rule except that the risk of jury-doubt is on the proponent B. who claims title through M's death.

2014 *Par. (e).* In applying the foregoing rules, a *counter-presumption* may by rule of law shift back to the proponent again the duty of passing the judge. — (W. § 2493.)

Illustration. In an action for injury caused by derailment of a car, the plaintiff's undisputed testimony shows the derailment to have been caused by a broken axle. The judge may rule this to raise by rule of law a presumption of negligence. The defendant may introduce some evidence of malicious track-obstruction by a third person, which the judge may rule to be sufficient for leaving the matter to the jury again. But further the defendant may introduce testimony to the system of daily inspection of each axle, and of careful purchase of rolling-stock. The judge may then rule that if the jury believe this testimony, a presumption of due care arises by rule of law. This presumption would then control, unless before closing the plaintiff introduced testimony that the particular axle was seen to be cracked at the station before the derailment; in which event the judge would leave the issue again open to the jury.

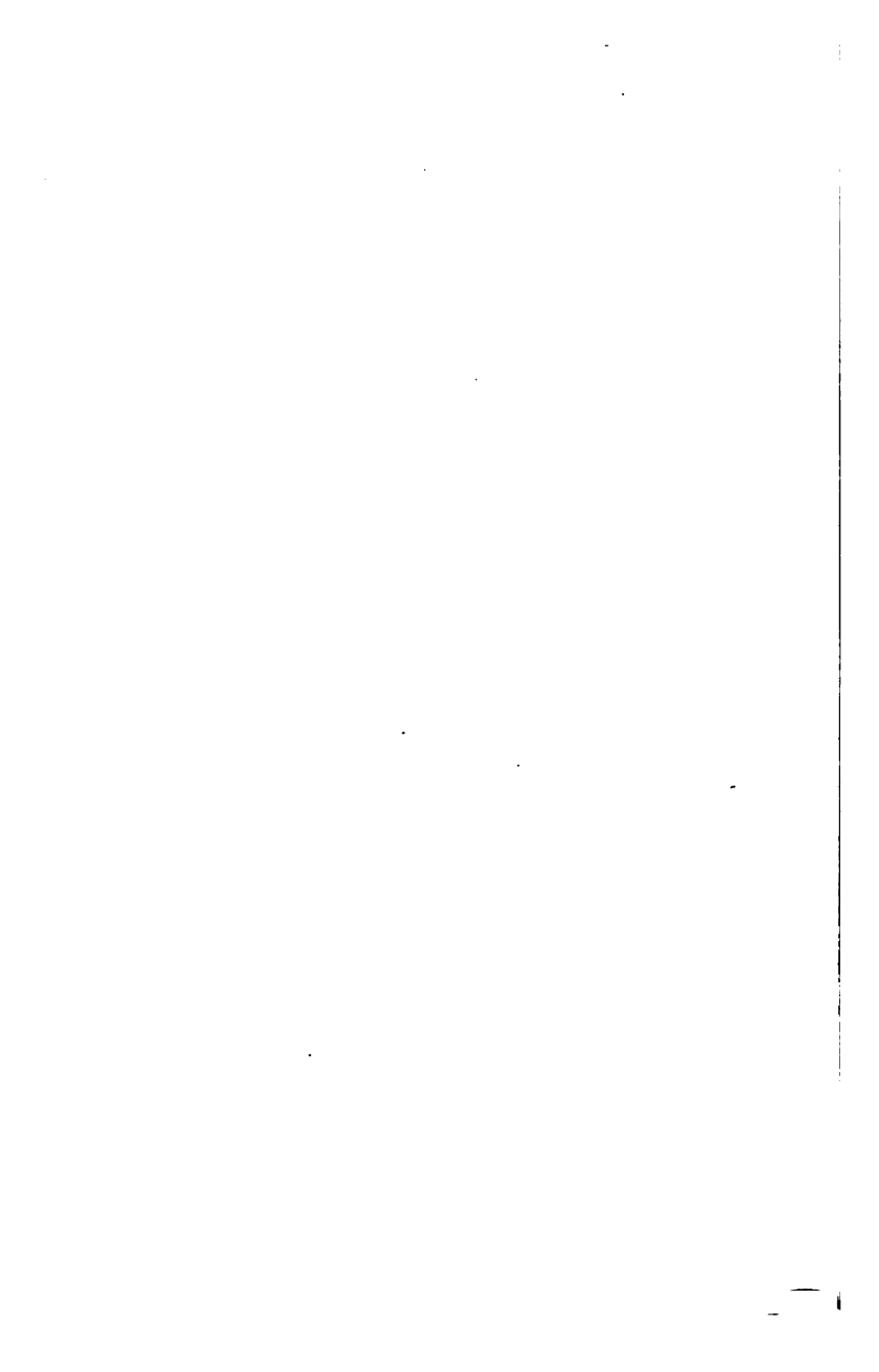
2015 *ART. 8. Time of Motion for Ruling of Sufficiency or Decisiveness.* A ruling on a motion to direct a verdict for insufficiency or decisiveness, made by an opponent, is only *discretionary* and *provisional* if made *before* the opponent has closed his case by introducing such evidence as he wishes;¹ after that time, it is *mandatory* and *final*. — (W. § 2496.)

Hence,

2016 *Par. (a).* A motion so made at the close of the proponent's evidence alone, and *without* a declaration by the *opponent closing his case*, need not be ruled upon.¹

2017 *Par. (b).* If it is then made, and is ruled upon *against* the opponent, he may proceed to introduce his own evidence,¹ and may thereupon *renew* the motion.

¹ On a demurrer to evidence, the opposite is the rule; hence some Courts perhaps still follow the practice for demurrers to evidence, where that form takes the place of a motion to direct a verdict.



2018 *Par. (c).* If the opponent does *not then renew* it, he *waives an error* in the provisional and discretionary ruling against him.

2019 *Par. (d).* If the opponent does then renew it, and the ruling is then made against him *correctly*, an *error* in the provisional and discretionary ruling against him is *cured*.

2022 **RULE 227.** *Risk of Jury-Doubt; Measure of Persuasion for Jury; and Rules of Risk for Parties.* The jury's state of persuasion as to the truth of an issue may be (1) either that they believe one or the other side of the issue (2) or that they are in doubt without believing.

(1) If the jury reach a belief, as determined by the standard defined in Arts. 1 and 2 below, they must render a verdict on that issue for the party whose contention they believe.

(2) If they do not reach such a belief for either party, they must render a verdict on that issue for the party who has the risk of doubt, as determined by Art. 3, below, and Rule 228 (*post*, § 2035).

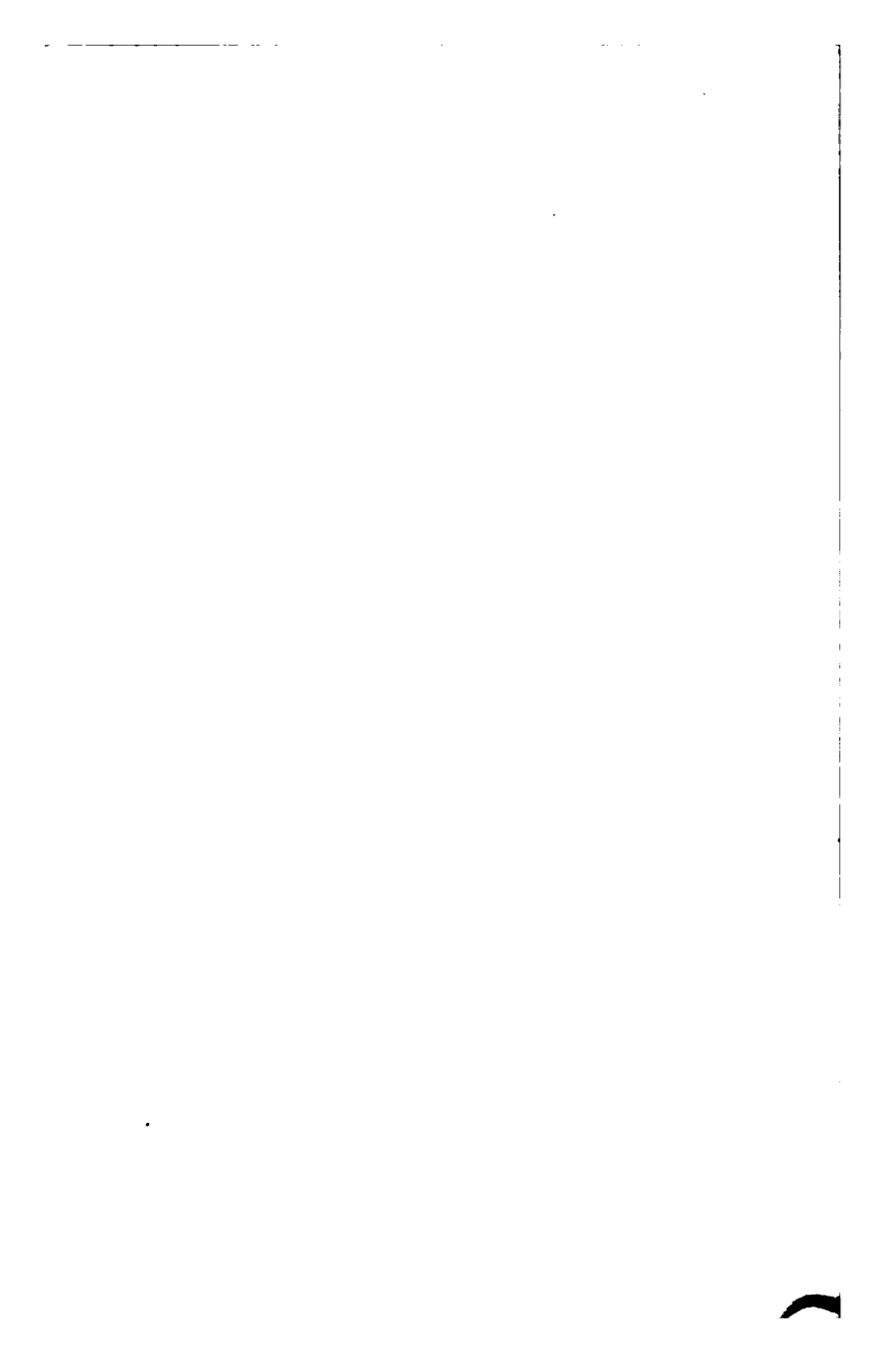
2023 **ART. 1.** *Measure of Persuasion in Criminal Cases.* The belief of the jury in a criminal case is measured by the following standards:— (W. § 2497.)

Par. (a). Wherever the issues are such that the risk of doubt is *exclusively on the prosecution* (as determined by the rules of pleading and of the parties' risk of doubt), their belief must amount to a sense of *being morally certain beyond any reasonable doubt*, *i. e.* in favor of the prosecution's contention on that issue.

2024 [*Par. (b).* In so far as there is also an issue in which the risk of doubt is *on the defendant*, as determined by Rule 228 (*post*, § 2035) their belief must reach only the measure appropriate to *civil cases*.]¹

2025 [*Par. (c).* The definition of such belief is not to be made by the trial judge to the jury in any other form of

¹ In some Courts an issue *e. g.* of insanity places the risk of doubt on the defendant.



words as matter of law; but he may illustrate to them his own idea of this definition, without review on appeal.¹]]

2026 [Par. (d). The belief thus defined is a belief upon the issue *as a whole*, and not a belief as to separate facts forming part of the issue.²]

2027 ART. 2. *Measure of Persuasion in Civil Cases.* The belief of the jury in a civil case may amount to

- (1) a sense of *seeing a preponderance of all the evidence*,
- or (2) a sense of being *safely and surely convinced*,³
- or (3) a sense of being *morally certain beyond any reasonable doubt*, as in criminal cases. — (W. § 2498.)

The application of these measures is determined in the ensuing paragraphs.

2028 Par. (a). The first above measure, a sense of *seeing a preponderance of all the evidence*, applies in all issues in civil cases not expressly excepted below.

2029 Par. (b). The second above measure, a sense of being *safely and surely convinced*, applies in the following issues:

- (1) *Fraud*.
- (2) Existence and contents of a *lost will*.
- (3) *Mutual mistake* as a ground for *reformation of a document*.⁴

2030 Par. (c). The third above measure, identical with that applied in criminal cases, applies in the following issues:

- [(1) In *defamation*, on a plea of the truth of an assertion of *crime*;]⁵
- [(2) In *insurance* actions, on a plea of *arson* by the insured;]⁶
- [(3) In *disbarment* proceedings.]

¹ Of course this is not law, but it ought to be.

² Some Courts practically deny this.

³ This phrase is a substitute for "clear and convincing proof," as used for several civil issues; it better expresses the medium between the other two standards.

⁴ On a few other issues, such phrases are sometimes used.

⁵ A few Courts accept this, or used to.

⁶ This is occasionally found.

1. 1. 1. 1.

•

•

•

•

•

1

2031 [Par. (d). The rules of Par. (c) and Par. (d) in Art.
1, above, apply here also.]

2032 ART. 3. *Rules of Risk of Doubt, for Parties.* The rules
allotting the risk of jury-doubt to the respective parties are
given in Rule 228 (*post*, § 2033), together with the rules for
allotting the duty of passing the judge, classified according
the various subjects of issues.



TITLE II:

PRESUMPTIONS AND BURDENS IN SPECIFIC ISSUES

2033 **RULE 228.** *Rules for Specific Issues.* (1) The rules for allotment of the *risk of jury-doubt* in a given subject of litigation depend ultimately upon the same general considerations as the allotment of pleadings, *i. e.* that party has the risk of doubt who in view of general experience in that class of litigation can in fairness be expected to adduce the evidence with most fullness and least hardship.

(2) The rules for allotment of the *duty of passing the judge* on a given issue depend ultimately on general experience as to the usual occurrence of the fact evidenced as making probable the fact to be proved, and as to the respective facility of proof for the parties. Where these combine in a high degree, a rule of presumption may arise; where in lesser degree, a rule of sufficiency.

2034 *Par. (a). Presumptions and Rules of Admissibility.* Every rule of presumption is based on experience in the probative value of some one fact or set of facts inducing belief of the other fact; hence,

every presumption makes use of some evidential process recognized in the ordinary logic of proof; and, any presumption may have some corresponding rule of admissibility as classified in Part I of this Code.

The difference is that the rule of admissibility merely presupposes the one fact to have some appreciable probative value towards the other fact; while the rule of presumption presupposes the probative value to be so strong that the latter fact may immediately be taken to be true, unless some other contrary evidence appears.

Illustrations. (1) To show a person's death, his departure from home in a ship, the loss of the ship, and the absence of news since that time, are evidential, on the principle of



negative traces retrospectantly evidencing an act (Rule 41, Art. 9, *ante*, § 295). But a rule of presumption may also be found on these and other facts together (Art. 23, *post*, § 2084).

(2) To evidence the doing of an act, a person's habit or system of doing it is in general evidential, as a prospectant circumstance evidencing an act (Rule 36, *ante*, § 170). But a particular habit or custom, viz. that of the government postal service in delivering letters, may be of such probative value as to raise a presumption (Art. 18, *post*, § 2068).

(3) The testimony of a qualified official, given by extrajudicial certificate or entry, may be admissible under Rule 148 A, Art. 5 (*ante*, § 1110) to evidence the contents of a deed recorded by him as duly executed. But the usual correctness of such testimony may in experience be so notable that a rule of presumption may be founded on it (Art. 18, *post*, § 2068).

(4) The experiential qualifications of a witness depend on a variety of circumstances, and for each witness these circumstances are ascertained and passed upon before admitting his testimony (Rule 83, Art. 3, *ante*, § 381). But if, conceivably, experience could show that the diploma of certain technical schools or boards was with fair regularity so granted as to signify competence in specific subjects, continuing to the time of trial, then a rule of presumption might be made applicable, on production of such diplomas.

(5) By Rule 73, Art. 4 (*ante*, § 352) the breaking of a rope in a factory may be admitted as a piece of evidence to show the defective condition of the machinery. But if in experience a certain class of such occurrences is due generally to defective materials whose defects could with due care have been discovered, then a rule of sufficiency or even a rule of presumption (Art. 11, *post*, § 2062) might be applied to that evidential fact.

2035 ART. 1. *General Tests for Risk or Duty.* There is no general test for the incidence of the risk of jury-doubt, nor for the rules of presumption or of sufficiency for passing the judge. — (W. § 2486.)

In particular,

2036 Par. (a). That the party having as a part of his case an allegation *affirmative in form* has the risk or duty is not a general test.

2037 Par. (b). That the party who apparently has *peculiar accessibility* to the facts has the risk or duty is not a general test.

2038 *Par. (c).* The incidence of the risk or duty is determined by rules separately applicable to each *kind of fact in issue*.

2039 *Par. (d).* For the *risk of jury-doubt*, the rules of pleading supply in the first instance the specific rules for risk of jury-doubt, *i. e.* the party who must plead a fact in order to make it available in law has the risk of jury-doubt on that fact when in issue. Where no rule of pleading obtains, the risk may further be subdivided on the facts belonging under a single issue of pleading.

2040 *Par. (e).* The duty of *passing the judge* falls in each instance first upon the party having the risk of jury-doubt, pursuant to Rule 226, Art. 1 (*ante*, § 1998).

2041 ART. 2. *Sanity in Civil Cases.* In civil cases, the risk of jury-doubt as to sanity is on the party affirming the doing of a legal act in which sanity is an element of validity. — (W. § 2500.)

Par. (a). In a *testamentary* cause, the fact of the testator's sanity is presumed from the fact of his formal execution of the will, [with additionally some evidence specifically of sanity.]¹

Cross-reference. Where some evidence specifically of *sanity* is required, the rule for putting in the entire testimony on the case in chief, and not waiting until rebuttal (Rule 163, Art. 5, *ante*, § 1365), becomes important, and often creates an unfair dilemma.

2042 *Par. (b).* For title by *deed*, the risk of jury-doubt is [on the party disputing the deed.]
[on the party claiming under the deed, but the formal execution raises a presumption of sanity.]

2043 *Par. (c).* For an *insurance* policy not payable on death by sane suicide, the risk of jury-doubt as to sane suicide is [on the insurer], and the fact of suicide raises [no] presumption of insanity.

¹ Courts differ on the bracketed clause.



ART. 3. *Sanity in Criminal Cases.* The risk of jury-
2045 doubt as to the sanity of the accused is

[on the prosecution, but the doing of the criminal act
raises a presumption of sanity.]

[on the accused, subject to the measure of belief specified
in Rule 227, Art. 1, Par. (b) (*ante*, § 2024).] — (W. § 2501.)

ART. 4. *Undue Influence or Fraud in Wills.* The risk of
2046 jury-doubt as to undue influence and fraud in testamentary
causes is

[on the party propounding the will.]

[on the party disputing the will,
subject to the same rule of presumption as in Art. 5.] — (W.
§ 2502.)

ART. 5. *Undue Influence or Fraud by Beneficiary Grantees.*
2047 The risk of jury-doubt as to undue influence or fraud by the
beneficiary is on the party disputing the deed; and the
confidential relation of a beneficiary who has drafted or
advised the terms in his own favor may by a ruling on the case
be deemed decisive of fraud or undue influence.¹ — (W.
§ 2503.)

ART. 6. *Conveyances Fraudulent against Creditors.* In a
2048 conveyance disputed on the ground of fraud against cred-
itors, the risk of jury-doubt is on the party disputing the con-
veyance. — (W. § 2504.)

But there are presumptions as follows:

2049 *Par. (a).* Of *fraud*, from the fact of the debtor's *reten-*
tion of possession;

2054 *Par. (b).* Of *good faith*, from the grantee's payment of
value.

Cross-reference. For the presumption of grantee's *title* from
his *possession*, see Art. 16 (*post*, § 2067).

ART. 7. *Marriage Consent, from Cohabitation or Ceremony.*
2055 The risk of jury-doubt as to the fact of marriage-consent is

¹ Such rulings are frequent, but there is hardly a general
rule of presumption.



on the party affirming the marriage. But there are presumptions as follows: — (W. § 2505.)

2056 *Par. (a).* Cohabitation [and repute] raise a presumption of consent.

2057 *Par. (b).* Continued cohabitation after removal of an initial impediment raises a presumption of consent.¹

2058 *Par. (c).* Performance of a ceremony raises a presumption of all facts essential to its validity.

2059 **ART. 8. *Marriage Capacity.*** Where the lawfulness of a later marriage depends upon a party being capable, and that party appears already by ceremony or cohabitation to have been married to another person so as to lack capacity for the second marriage, [the second marriage raises a presumption of capacity existing by reason of termination of the former status or by reason of the first marriage's invalidity or otherwise; but if this presumption is removed by some evidence to the contrary additional to the mere fact of the prior marriage, then the case is open to the jury on all the evidence];² the risk of jury-doubt being on the party affirming the lawfulness of the second marriage, unless the pleadings otherwise require.

2060 **ART. 9. *Negligence Contributory by a Plaintiff.*** The risk of jury-doubt on the fact of contributory negligence of a plaintiff in an action of tort for damage to person or property is [on the plaintiff.]

[on the defendant; but by presumption of law or by ruling on the case, based on the plaintiff's conduct, the duty of passing the judge may be shifted to the plaintiff].³ — (W. § 2507.)

¹ There are here variant details in different Courts.

² The precedents are hopelessly opposed; the above rule seems simple, and avoids the artificial logic often found in the opinions.

³ Most Courts accept the second bracketed clause; the detailed rules based on the plaintiff's conduct are bound up with the rules of substantive law as to negligence *per se*.



ART. 10. *Negligence of Bailee.* In an action against a
2061 bailee for the non-return of goods delivered to him,

[(1) the risk of jury-doubt as to facts creating liability is on the bailor;

(2) but the duty of passing the judge is shifted by presumption of law to the bailee if the goods were destroyed or lost or refused;

except where by Art. 29 (*post*, § 2093) governing express contracts, a different rule is provided.]¹ — (W. § 2508.)

ART. 11. *Negligence in Defective Machines and Apparatus.*
2062 In an action for injury to goods or person caused by means of machines, vehicles, place, or apparatus,

[(1) the risk of jury-doubt is on the plaintiff;

(2) but the duty of passing the judge is shifted by presumption of law to the defendant if

1. The party charged was in control of the injurious thing at the time,

2. And the thing is ordinarily not injurious except for lack of proper construction, inspection, or user,

3. And the injury occurred without voluntary action by the injured person.]² — (W. § 2509.)

Distinguish the rules of substantive law as to negligence *per se*, e. g. for fire set by railroad locomotives, animals killed on a railroad track.

ART. 12. *Cause of Death.* Where a person dies, and it is
2063 material in law whether his own intent or negligence, or that of a third person, caused his death,

[(1) the risk of jury-doubt is determined by the nature of the issue under other rules;

(2) if the risk of jury-doubt is on a plaintiff basing some right upon the death, the duty of passing the judge is shifted by presumption of law that the death was not self-caused with intent or negligence.]³ — (W. § 2510.)

Illustrations. (1) In a life-insurance policy, the risk of jury-doubt for the plaintiff extends only to the fact of death (by

¹ There is here great variety of rule on all details.

² There are here various other tests; some of them are limited to particular classes of apparatus.

³ Here a variety of forms of rule is found.

.

.

the contract-rule), and for suicide the insurer has the risk of jury-doubt from the start; hence no presumption is needed. But if in accident-insurance accident is a part of the plaintiff's case, and the risk of jury-doubt as to accident is therefore on the plaintiff, then the presumption would enter to help him.

(2) In an action for death at a railway crossing, if by Art. 9 the risk of jury-doubt as to contributory negligence is already on the plaintiff, then the presumption of the deceased's care (where the body is found by the track, and no eye-witnesses appear) will assist the plaintiff. But if the risk of jury-doubt is on the defendant at the outset, no presumption is needed; and of course no Court maintains in such cases a presumption of lack of care.

ART. 13. *Criminal Intent*. Where a specific mental state — 2064 knowledge, intent, or the like — is material to a penal liability,

(1) the risk of jury-doubt is on the prosecution;

(2) but the duty of passing the judge may be shifted to the defendant, by presumption of law, in particular issues by particular conduct of the defendant.¹ — (W. § 2511.)

Illustration. The possession of intoxicating liquor in a shop, may raise a presumption of intent to sell.

Distinction. The common-law "presumptions," so-called, here are usually rules of substantive law, *e. g.* that of malice from the use of a deadly weapon.

ART. 14. *Criminal Capacity*. Where a penal liability 2065 depends on a particular mental or moral capacity,

(1) the risk of jury-doubt is on the prosecution;

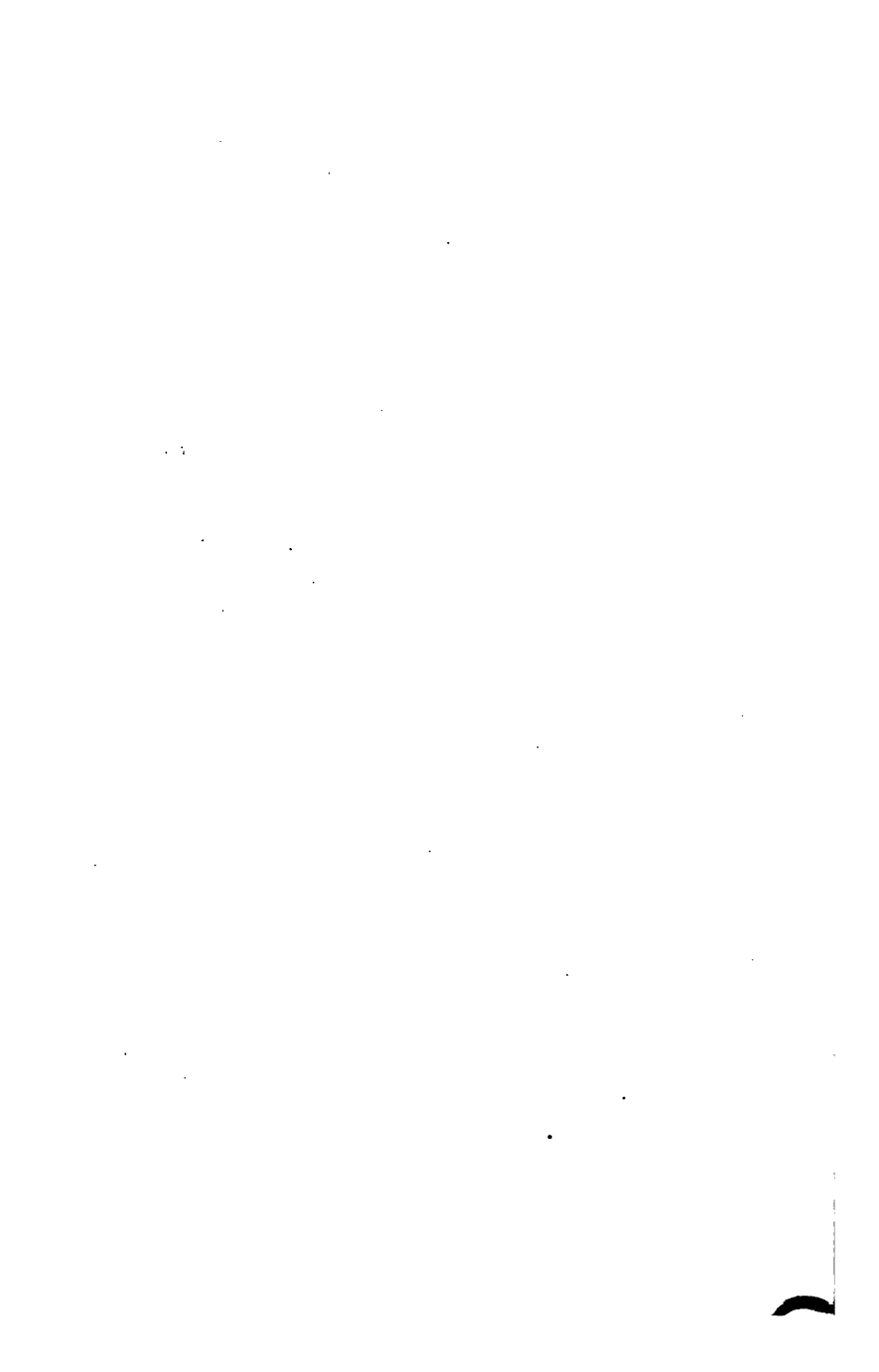
(2) the duty of passing the judge is shifted to the defendant by presumption of law in the following cases: — (W. § 2514.)

Par. (a). In every case, where *intoxication* is brought into issue in mitigation.

Par. (b). Where *age* is brought into issue in mitigation, if the defendant is over fourteen years of age.²

¹ At common law, few Courts have acknowledged any real presumptions against the defendant in a criminal case; but hundreds of statutes have made rules of "*prima facie* evidence," which apparently means a rule of presumption.

² Under juvenile court laws, this figure is higher.



Par. (c). Where *sanity* is brought into issue, as provided in Art. 3 above.

Par. (d). Where *coercion* of a wife by a husband is brought into issue, if the husband was present when the wife acted as charged.

ART. 15. *Criminal Acts.* In all criminal issues as to the 2066 doing of the act charged.

(1) the risk of jury-doubt is on the prosecution;

(2) the duty of passing the judge does not shift to the defendant by any presumption of law;

except as follows:¹ — (W. §§ 2512, 2513.)

[*Par. (a).* The grant of a *license* to do an act; here the risk of jury-doubt is on the defendant.]

[*Par. (b).* *Self-defence*, on a charge of corporal violence; here the risk of jury-doubt remains on the prosecution, but the duty of passing the judge is on the defendant.]

[*Par. (c).* *Larceny* and other forms of criminal taking from another's possession; here the risk of jury-doubt remains on the prosecution; but the duty of passing the judge is shifted to the defendant, if the defendant was found in exclusive possession of the goods recently after their loss; and this duty is satisfied by some evidence in explanation.]

ART. 16. *Ownership, from Possession.* Where ownership 2067 of property by a particular person is material,

(1) the risk of jury-doubt is determined by the nature of the action;

(2) the duty of passing the judge is shifted to the opponent, by presumption of law, if the person in question was in possession of the property at the time. — (W. §§ 2515, 2516.)

This rule applies

Par. (a) to *real property*;

Par. (b) to *chattels*;

¹ In all these enumerated acts, there is variance of rule.



Par. (c) to negotiable instruments.¹

2068 ART. 17. *Payment.* Where the payment of an obligation of contract is in issue,

(1) the risk of jury-doubt is on the party claiming discharge by payment;

(2) the duty of passing the judge is shifted to the opponent by presumption of law in the following cases: — (W. §§ 2517, 2518.)

Par. (a). By lapse of time, depending on a ruling on the case;

[*Par. (b).* By a written receipt in full;]

[*Par. (c).* By the obligor's possession of the instrument of obligation after maturity.]

2069 ART. 18. *Documents; Execution, Delivery, Revocation, Spoliation, Alteration.* Where the execution or the delivery of a document is material,

(1) the risk of jury-doubt is determined by the nature of the action;

(2) the duty of passing the judge is shifted to the opponent by presumption of law in the following cases: — (W. §§ 2519-2525.)

2069a *Par. (a).* As to the authorship of a letter or telegram, its arrival in due course of reply to another already sent to the purporting author, is by rule of law a sufficiency, but not a presumption.

Cross-reference. For admissibility on this point, see Rule 191, Arts. 3, 4 (*ante*, §§ 1625-6).

2070 *Par. (b).* As to execution of a deed, the public lawful recording raises a presumption.

2071 *Par. (c).* As to delivery of a deed, the grantee's possession raises a presumption.

Par. (d). As to date of a document's signature, the

¹ Here several variant forms are recognized.

1

2

3

4

5

6

2072 *purporting date* raises a presumption; except in the case covered by Rule 139, Art. 3 (*ante*, § 973).

2073 *Par. (e).* As to *execution* of an *official document*, the purporting seal of a purporting officer raises a presumption wherever it furnishes a sufficiency under Rule 193 (*ante*, § 1633).

2074 *Par. (f).* As to *execution* of an *ancient document*, its age, custody, and appearance furnish a sufficiency as provided in Rule 190 (*ante*, § 1608), [and also a presumption].

2075 *Par. (g).* As to *execution, contents, and loss* of a *deed of grant*, the long-continued *possession* of the land may raise a presumption.¹

2076 *Par. (h).* As to the *execution* of a will, the *attesting signatures* furnish a sufficiency, as provided in Rule 130, Art. 9 (*ante*, § 886) [and also raises a presumption].

2077 *Par. (i).* As to *revocation* of a will by *destruction*, the disappearance after the testator's death of a will once executed may furnish a sufficiency by ruling on the case [and also a presumption].

2078 *Par. (j).* As to the *contents* of a document, the *spoliation* or *suppression* of it by its possessor may furnish a sufficiency by ruling on the case, pursuant to Rule 118, Art. 4 (*ante*, § 654), that its contents are as alleged by his opponent, [and also a presumption].

2079 *Par. (k).* As to the *alteration* of a document having been made upon it *before* or *after execution*,
 [(1) The risk of jury-doubt is determined by the nature of the action;
 (2) the duty of passing the judge may be shifted to the opponent by ruling on the case.]

2080 ART. 19. *Legitimacy.* Where the fact of parentage of a husband is material in an issue of *legitimacy*,

¹ This is virtually a rule of substantive law, as often applied, and depends somewhat on local statutes.

(1) the risk of doubt is determined by the nature of the action;

[(2) the duty of passing the judge is shifted by presumption of law, if the child was born after marriage of the mother and husband;

(3) if there was cohabitation as husband and wife, no further fact need in law be established.]— (W. § 2527.)

ART. 20. *Chastity.* Where the fact of chastity is material,
2081 (1) the risk of doubt is determined by the nature of the action;

[(2) the duty of passing the judge is not shifted to the opponent by any presumption of chastity.]— (W. § 2528.)

ART. 21. *Identity of Person.* Where the identity of two
2082 personages as one being is material,

(1) the risk of jury-doubt is on the party to whose case identity is necessary;

(2) the duty of passing the judge may be satisfied by a ruling on the case as to sufficiency [and may be shifted to the opponent by ruling on the case,] if the two personages are substantially identical in name and other circumstances co-exist.— (W. § 2529.)

ART. 22. *Continuity of Ownership, Possession, Residence,*
2083 etc. Where the fact of ownership, possession, residence, or other human relation to things or places is material in point of time,

(1) the risk of jury-doubt is determined by the nature of the action;

(2) the duty of passing the judge may be satisfied by a ruling on the case as to sufficiency [and may also be shifted to the opponent by a ruling on the case,] if the ownership or other relation existed at a time before or after and was likely to be continuous.— (W. § 2530.)

ART. 23. *Continuity of Life; Death; Survivorship.* Where
2084 the fact of a person's being alive at a certain time is material,

(1) the risk of jury-doubt is determined by the nature of the action;

(2) the duty of passing the judge may be satisfied or shifted as follows:— (W. §§ 2531, 2532.)

Par. (a). For a party having the risk of jury-doubt as to one's *being alive*, the duty may be satisfied by ruling on the case as to sufficiency or decisiveness, if the person was alive at a time before or after and the life was likely to have been continuous.

2085 *Par. (b).* For a party having the risk of jury-doubt as to one's being *not alive* (deceased),

(1) the duty may be satisfied by a ruling on the case as to sufficiency;

(2) and is shifted to the opponent by presumption of law if the person alleged as deceased has been (a) absent from his home (b) unheard from (c) during seven years before the time at which death is material;

(3) and may also be shifted by ruling of decisiveness on the facts, if a period of natural life has elapsed since his last known time of being alive.

2086 *Par. (c).* For a party having the risk of jury-doubt as to one person being alive after another had died,

(1) the duty may be satisfied by ruling of sufficiency on the case [and may be shifted by presumption of law based on specific circumstances where both persons died in a common calamity].

[[(2) In every case, where such deceased persons have made testamentary provisions substantially identical, the survivorship becomes immaterial, and such testamentary provisions shall be deemed applicable, whether or not the risk of jury-doubt or the duty of passing the judge is fulfilled.]]¹

2087 ART. 24. *Seaworthiness.* Where the seaworthiness of a vessel is material,

(1) the risk of jury-doubt is determined by the nature of the action;

(2) the duty of passing the judge may be satisfied by ruling of sufficiency on the case, or may be shifted to the opponent by presumption of law, according to the circumstances of the vessel's loss. — (W. § 2533.)

¹ This is probably not law anywhere, but is needed to prevent the unendurable botch of justice which is likely otherwise to occur in such cases.

ART. 25. *Performance of Official Duty; Regularity of Proceedings.* Where an official act is material, whether as a separate act or as a part of a series of procedural acts,

(1) the risk of jury-doubt is determined by the nature of the action;

[(2) the duty of passing the judge may be satisfied or shifted by ruling on the case, according to the kind of act in question.] — (W. § 2534.)

ART. 26. *Title to Public Office.* Where a person's title to public office is material,

(1) the risk of jury-doubt is determined by the nature of the action;

(2) the duty of passing the judge may be shifted by presumption of law, if the person has publicly acted in that office without contrary repute. — (W. § 2535.)

Distinguish (1) the rule exempting from *production* of the document of *appointment* (Rule 126, Art. 1, *ante*, 806);

(2) the rule of substantive law that the acting as officer *de facto* suffices as against third persons.

ART. 27. *Incorporation.* Where the fact of due incorporation is material,

(1) the risk of jury-doubt is determined by the nature of the action;

(2) the duty of passing the judge is shifted to the opponent by presumption of law, [or by ruling on the case, if there has been a course of action as a corporation].¹ — (W. § 2535.)

Distinguish (1) the admissibility of *reputation* to evidence incorporation (Rule 147, Art. 5, *ante*, § 1084).

(2) the rule of substantive law that a *de facto* corporation is sufficient.

ART. 28. *Foreign Law.* Where the tenor of a rule of foreign law is material,

(1) the risk of jury-doubt is determined by the nature of the action;

[(2) the duty of passing the judge is shifted to the opponent by a presumption of law that the foreign law is identical with

¹ Some such facile mode of raising a presumption is here needed.

the common law of the forum, if the foreign State has accepted the English common law as the foundation of its system, or if a rule of the common law merchant is involved; and also by a presumption that the foreign State has a statute identical with that of the forum, if the statute of the forum is of a class commonly enacted in such States.]¹ — (W. § 2536.)

2092 [[*Par. (a).* Where either party demands, the Court must order one or the other to produce evidence of the tenor of the foreign law, and will stay judgment until this is done.]]²

Distinguish the doctrine of *judicial notice of foreign law* (Rule 230, Art. 3, *post*, § 2132).

2093 **ART. 29. *Contracts.*** For facts material in an action on a contract, the risk of jury-doubt is determined by the nature of the contract and the rules of pleading; and the duty of passing the judge is determined by the Articles herein applicable to different kinds of facts.

2094 **ART. 30. *Statute of Limitations.*** Where the lapse of a time of limitation barring a cause of action is material,

(1) the risk of jury-doubt is [on the party to whose case the bar is essential;

(2) the duty of passing the judge is shifted to the opponent, by presumption of law or ruling on the case, where the latter by his pleading or otherwise has admitted facts which suffice, if unexplained, for that purpose.] — (W. § 2538.)

2095 **ART. 31. *Malicious Prosecution.*** In an action for malicious prosecution,

(1) the risk of jury-doubt as to all three of the essential facts, namely, favorable termination of the prior proceeding, lack of probable cause, and malice, is on the plaintiff;

(2) the duty of passing the judge may be satisfied or shifted

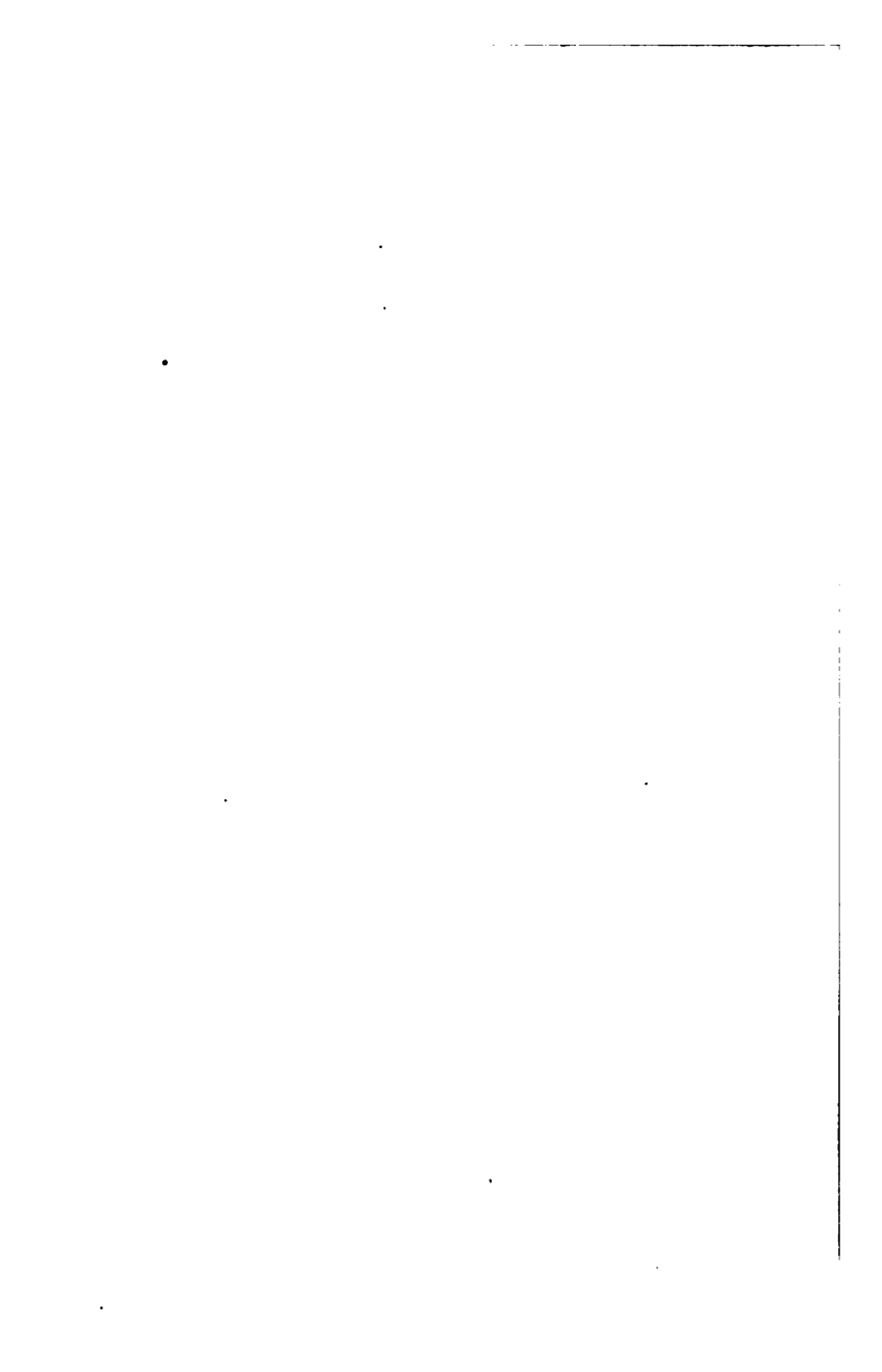
¹ There is here great looseness and confusion of rulings and the above rule attempts to reconcile them.

² No such rule yet exists. But is it not senseless to waste energy and risk mistake on a rule of presumption, inasmuch as the foreign law, in these days, can practically always be ascertained with a little trouble?

by ruling on the case, or by rule of law as follows:— (W. § 2539.)

Par. (a). For lack of probable cause, the plaintiff may establish a sufficiency of evidence [or, a presumption of law] by the fact of the magistrate's dismissal of the prior cause.

Par. (b). For lack of probable cause, the defendant may establish a counter-presumption, shifting the duty to the plaintiff, by the fact of advice given by counsel on full disclosure of the evidence.



BOOK III:

LAW AND FACT; JUDGE AND JURY .

(TO WHOM EVIDENCE MUST BE PRESENTED)

RULE 229. *General Principle.* As between the trial judge
2100 and the jury, the authority to determine the various issues
that may arise in the litigation is allotted as follows: To the
jury, the issues of fact; to the judge, the issues of law;
except as follows:— (W. § 2449.)

ART. 1. *Facts preliminary to Admissibility of Evidence.*
2101 The judge determines any fact which becomes material to a
ruling upon the admissibility of evidence. — (W. § 2550.)

Illustrations. Whether a witness is qualified as an expert;
whether a documentary original is lost, so that a copy is
admissible; whether a deponent is deceased, so that his
deposition is admissible.

Par. (a). The judge's finding and ruling have effect
2102 for the purpose of *admissibility* only, but are *conclusive*
for that purpose. Hence, when a judge has ruled upon a
fact which is by law preliminary to admissibility, and has
determined the fact to exist so that the evidence is ad-
mitted, the jury does not re-determine or re-consider the
fact for the purpose of rejecting the admitted evidence,
as being inadmissible by law, if they should find contrary
to the judge. The jury may believe or not believe, as they
see fit, the preliminary fact; but they are in every case
to give the admitted evidence such value as it seems to
merit intrinsically, irrespective of any rule of law as to
admissibility;

¹ [*except* in the following classes of evidence:

(1) Confessions (Rule 122, Art. 10, *ante*, § 724).

(2) Dying declarations (Rule 138, Art. 6, *ante*, § 964).

Illustrations. (1) A confession is objected to because made
under the influence of threats of a police-officer. The judge

¹ A few Courts improperly acknowledge these exceptions.



finds that it was not made under the influence of threats, although threats were used; and admits the confession. The jury are now to consider the confession with the threats, and give to it such great or little weight as they see fit; but they are not to reject it as a matter of law because they may conclude, contrary to the judge, that the threats did influence the confession.

(2) A dying declaration is objected to on the ground that the declarant did not expect a speedy death. The judge finds that he did, and admits the declaration. The jury may then give it such credence as they see fit under all the circumstances; but they are not to reject it, as matter of law, merely because they believe, contrary to the judge, that the declarant did not expect death speedily.

2103 *Par. (b).* The judge may for this purpose hear evidence on both sides; and he may meanwhile cause the jury to withdraw.

2104 **ART. 2. Negligence.** The jury determines an issue of negligent conduct, subject to the judge's instructions on rules of law. — (W. § 2552.)

2105 *Par. (a).* The jury must observe the rules of law, if any, which not merely define the legal tests of negligent conduct in the abstract, but make specific conduct to be negligence *per se*; in such case the jury have no issue of negligence in general to determine.

Illustration. In an action for injury done by a motor-car running over a foot-passenger, the judge may state to the jury the definition of negligence or due care, and then they will apply it to the facts as found by them. But if there is a specific rule of law that the driving of a car at a greater speed than twenty miles an hour is *per se* negligent, the jury can no longer deliberate on the quality of negligence, but must find for the plaintiff if in fact the car-speed was exceeding the limit. This is not an exception to their function of deciding on the facts; rather, the issue has ceased to be one of fact.

2106 [*Par. (b).* Where the facts are *undisputed* [and fair-minded men could draw but one inference from them], the question of negligence is for the judge.]¹

¹ Many Courts use this phrasing, with some variations. But it is really not an exception under the present rule; it is merely another way of stating the judge's function of ruling on sufficiency of evidence, under Rule 226, Art. 3 (*ante*, § 2002).

Illustration. In an action for injury by a train at a street-crossing, the plaintiff testifies that he looked and saw the train coming and supposed that he had plenty of time to cross the track safely. As matter of law, this may be not contributory negligence *per se* (under Par. (a) above), and remains a question of fact. But since the judge may assume, as against the plaintiff, the truth of his own testimony, he may take the fact to be as stated by the plaintiff, and may then, by a ruling of conclusiveness on the case (under Rule 226, Art. 3, *ante*, § 2002), find contributory negligence and direct a verdict for the defendant on that issue. By Par. (b) above, this would be an instance of the issue of negligence determined by the judge; but it is equally and better explainable as a ruling under Rule 226.

ART. 3. *Reasonableness.* The jury determines an issue of 2107 reasonableness, subject to the judge's instructions on rules of law.¹ — (W. §§ 2553, 2554.)

2108 Par. (a). The jury must observe the *rules of law* which make specific conduct to be reasonable or unreasonable *per se*.

Illustrations. A payee's notice to an indorser of non-payment of a note, mailed on the Monday after the Friday of non-payment, may by law not have been sent within a reasonable time, if there is a specific rule for cities that twenty-four hours is the maximum reasonable time.

2109 Par. (b). The judge may make a ruling of sufficiency or of *conclusiveness*, here as in other issues, pursuant to Rule 226, Art. 3 (*ante*, § 2002).

Illustration. In an action against the owner of a store abutting on the highway, for obstructing the highway an unreasonable time by the delivery of goods, the undisputed testimony may show that the obstruction continued for half an hour only and was caused by a broken truck-wagon. The judge may, by ruling on the case, hold that there is not sufficient evidence of unreasonableness to go to the jury.

2110 ART. 4. *Documents.* The existence, execution, contents, and meaning of a document are determined by the jury; the construction of its terms in their legal effect is for the judge:

¹ The rulings in which reasonableness is determined by the judge are mostly explainable under Par. (a) or Par. (b). But there is in some jurisdictions early authority for leaving reasonableness in general to the judge.

subject to the following details and qualifications: — (W. § 2556.)

2111 *Par. (a).* The judge determines the existence and tenor of a domestic judicial record, including that of any court in the dominion of the United States; [[and also of any official document foreign or domestic.]]¹

2112 *Par. (b).* The sense of the parties' words in the document, [in so far only as extrinsic circumstances are in any way resorted to for aid in showing that sense, or in so far as oral utterances also form part of the transaction with the document,] is for the jury; but the legal effect which is by rule of law attached to any terms in the document is determined by the judge and stated by him in instructions to the jury.²

Illustrations. (1) In an action on a contract for sale of goods, the buyer agrees that "no delivery of a subsequent instalment shall be called for until prior instalments are paid for." It appears that this clause was printed on the foot of a form-blank and was cancelled in red ink. One prior payment had been made by a note for 30 days, and another had been paid for by certified check, but the amount due was in dispute. The judge will here determine (1) the legal effect of the condition as to exempting the seller from an action for breach of contract by rescinding *in toto* on a single default, (2) the legal validity of the cancelled clause, as having been struck out by the buyer on signing after the seller, (3) and perhaps the legal effect of a certified check as payment; but the jury will determine (4) whether under all the circumstances the amount paid was the amount due and payable, and (5) perhaps whether by trade usage and mutual circumstances the term "paid" signified payment in cash or otherwise.

(2) In a will devising land described by metes and bounds "to M and his heirs if any," the judge will determine the effect of the *habendum* clause, and the jury will determine the application of the description to specific land.

2113 ART. 5. *Criminal Intent.* The intent in an act charged as a crime is determined by the judge, so far as it is a matter of substantive law or of rules of presumption under Rule 228,

¹ This clause ought to be law, but is not.

² The judicial phrasings are here more or less inconsistent. The bracketed clause is apparently law in some Courts; but on principle its limitation is unsound, in view of the principles of interpretation noticed in Rule 222 (*ante*, § 1958).

Art. 13 (*ante*, § 2064); but by the jury, so far as it is a matter of fact. — (W. § 2557.)

2114 *Par. (a).* In criminal *libel*, the intent is matter of fact.

2115 ART. 6. *Law.* The existence and tenor of any rule of law, and its force as applying to any given state of facts, is determined by the judge; except as follows:

[*Par. (a).* A rule of *foreign* law is determined by the jury].¹ — (W. § 2558.)

2116 [*Par. (b).* A rule of *local* law may in *criminal* cases be determined by the jury, in so far that the jury are entitled to disregard the judge's instructions if they believe them not to be correct in statement.]² — (W. § 2559.)

¹ Most Courts so hold, but it is unsound in principle and in policy.

² This absurd and subversive doctrine obtains in a few States.

7

BOOK IV:
OF WHAT PROPOSITIONS
NO EVIDENCE NEED BE PRESENTED
TITLE I: JUDICIAL NOTICE

2120 RULE 230. *General Principle.* The judge is authorized to dispense with the introduction of evidence on a proposition to be proved which can safely be assumed by him to be true, until disputed by contrary evidence. — (W. §§ 2565, 2566.)

(*Reason and Policy.* The object of this rule is to save time, labor, and expense in securing and introducing evidence on matters which are not ordinarily capable of dispute and are actually not *bona fide* disputed, and the tenor of which can safely be assumed from the tribunal's general knowledge or from slight research on its part. The foundation of the rule is that the opponent does not actually or *bona fide* dispute the fact, and that therefore the introduction of evidence would be a burdensome formality. Hence, on the one hand, the scope of the rule can afford to be very broad, in the absence of real dispute; and on the other hand, it must never be used to prevent the demonstration of the actual incorrectness of the assumption, if by evidence the opponent is *bona fide* ready to attempt to do so. It thus becomes a useful expedient for speeding trials and curing informalities.)

Distinguish (1) the question whether a fact capable of being judicially noticed *need not be alleged in a pleading*, or may be corrected if erroneously alleged; this is a further question of the law of pleading, and its decision may not be the same, though it often is.

(2) The question whether a judge must accept the determination of another constitutional body, such as a legislature declaring war or an executive recognizing a foreign State.

2121 *Par. (a).* The judicial notice of a fact is only a provisional ruling, which becomes conclusive if not *bona fide* disputed; the party disfavored by the fact may therefore introduce evidence to the contrary. — (W. § 2567.)

2122 *Par. (b).* If the matter is one of a class falling within the jury's function to determine under Rule 229 (*ante*, § 2100), the *jury must take the fact* as noticed by the judge; [unless evidence to the contrary is introduced, in which case the jury determine the fact for themselves.]¹ — (W. § 2567.)

2123 *Par. (c).* If the matter is one of a class falling within the judge's province to determine, the rule of *Par. (a)* applies correspondingly.

2124 *Par. (d).* The judge is not bound, either at the trial or on appeal, to notice a fact in every instance, solely because it falls within a class described in the ensuing articles; those rules define the classes of facts which he is *authorized to notice*, but leave him free to decline to notice any particular fact where under the circumstances he deems it safer to require the introduction of evidence.² — (W. § 2568.)

2125 *Par. (e).* The judge may *investigate* or refresh his memory with any sources of information, for the purpose of ruling whether a fact is suitable and safe to be noticed; and, as a means therefor, may consult materials furnished by the parties themselves.

Illustrations. The judge may look at the statute-book, an almanac, a map, a dictionary, or the records of the court; and it is immaterial whether he finds the documents himself or looks at one supplied by a party publicly in court; the theory being that the fact may be one inherently not capable of serious dispute, and yet its precise tenor may not be present in his mind until reference is had to some source of information, *e. g.* whether last July 4 fell on Sunday or Monday.

2126 *Par. (f).* In determining that a fact should be judicially noticed the judge is not to consider any *information acquired from sources personal and private to his own experience* and not common to the parties and the public

¹ Some Courts and Codes apparently are *contra* to this clause, but principle and policy require it.

² This is orthodox in theory, and highly salutary; but in practice many or most judges ignore it. It makes possible the broadest use of the rule, by authorizing notice freely while not compelling it in any case.



at large; such personal information can be availed of only by his taking the stand as a witness, pursuant to Rule 156, Art. 2 (*ante*, § 1270) and Rule 167, Art. 2 (*ante*, § 1404). — (W. § 2569.)

Illustration. A statute forbade an appearance by professional attorney in a justice' court unless the party was prevented from personal attendance by sickness or by absence from the county. The judge may not notice that the party is absent from the county because he is a brother of the party and saw him yesterday depart on the train. The judge may notice that a particular person appearing is an attorney, because it is a matter of court record.

2127

Par. (g). The judge may authorize the *jury also* to notice any fact, of a class described in the ensuing articles, which they from general experience may believe to be safely assumable as a fact usually plain without evidence formally introduced, even though the judge is himself not prepared to state as matter of law the precise tenor of such fact to be noticed; subject to the foregoing limitations (*Par. (f)*) as to not using their private sources of information, and (*Par. (b)*) as to considering contrary evidence.¹ — (W. § 2570.)

Illustrations. Whether in general a person in danger will try to save himself by calling for help; whether a game played with bone-counters is usually played for money.

2130 ART. 1. *Classes of Facts authorized to be Noticed.* The classes of matters which are authorized to be judicially noticed are as follows:

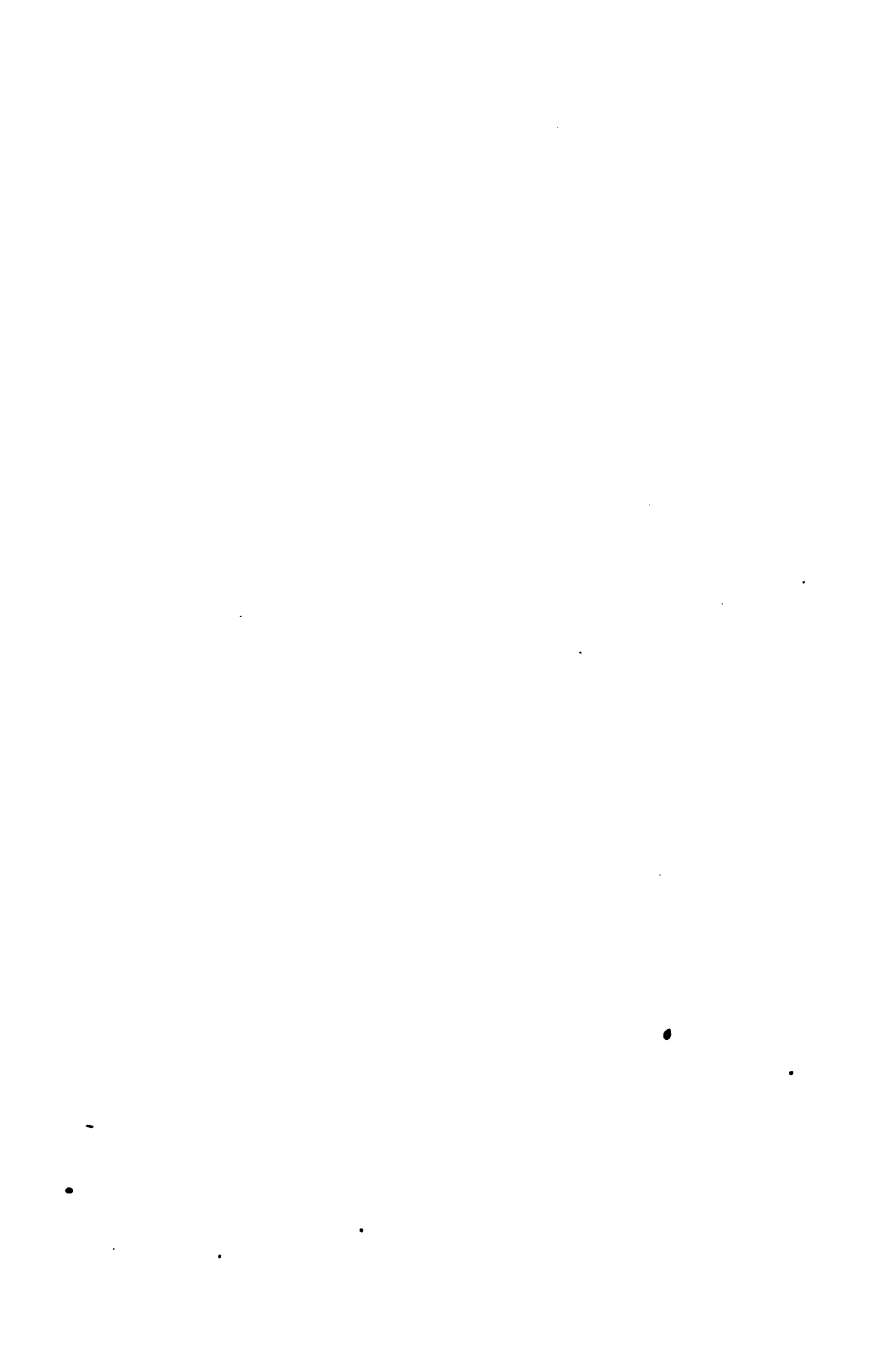
A. Matters which are necessary for exercising the judicial functions and are therefore likely to be already known to the judge by virtue of his office;

B. Matters which are actually so notorious in the community that evidence would be unnecessary;

[C. Matters which are not either necessary for the judge to know nor actually notorious, but are capable of such positive and exact proof, if demanded, that no party would be likely to impose upon the tribunal a false statement in the presence of an intelligent adversary.]² — (W. § 2565.)

¹This rule has seldom been given by judges a general phrasing; but the above seems justified.

²This class has not been so defined in general, but is represented by numerous precedents.



[[*Par. (a).* In exercising the authority to notice judicially, in accordance with the classes of facts above enumerated,

(1) the judge is to regard the enumeration merely as a *guide to his actual belief* that the fact in question can safely be noticed, and not as a rule of compulsion, nor as implying that any fact falling within these classes should be noticed irrespective of the circumstances of the case in hand;

(2) the judge may notice a fact which partly satisfies two or more classes defined without fully satisfying any one, or which as a class should not be noticed, if in the circumstances it may safely be noticed.]]¹

Illustrations. (1) In an action for fees wrongfully collected in office, the defendant and the plaintiff being rival candidates at an election for Secretary of State, the judge would not notice that one or the other was elected to that office, the title being actually in dispute; yet otherwise he would notice the name of the undisputed incumbent.

(2) In an action for arrest, the Court may notice that in the particular village there is only one justice of the peace and his name is William Sykes, although in general it might not be wise to hold that the names of incumbents of that office would be noticed.

(3) That a certain wharf did not abut from a certain public park might safely be noticed, although the fact could perhaps not be classed strictly as matter of law nor as matter of notoriety.

2131 ART. 2. *Domestic Law.* A rule of law of the forum, contained in judicial decision or in legislative enactment, is authorized to be judicially noticed; — (W. § 2572.) and this includes

Par. (a). a *public* or general statute;

Par. (b). a statute of *municipal incorporation*;

Par. (c). a statute of *incorporation* for private companies or public service companies by *general provisions*;

Par. (d). a *judgment* declaring a *principle* of law; but does not include

¹ This paragraph is probably not yet law anywhere in this form; but it represents the spirit of many precedents.

Par. (e). a statute of *incorporation by special charter*;

Par. (f). a *private act*;

Par. (g). an ordinance of a *local governmental office*;

[*Par. (h).* a regulation of a *Federal* or *State executive department*.]

ART. 3. *Foreign Law.* A rule of law in another forum,
2132 contained in judicial decision or in legislative enactment, is
authorized to be judicially noticed in the following cases:—
(W. § 2573.)

[[*Par. (a).* in a State or Territorial court, the law of
another State or Territory or Dependency of the United
States.]]¹

*Distinguish the presumption as to foreign law (Rule 228, Art.
28, ante, § 2091).*

Par. (b). in a State or Territorial court, the Federal law.

Par. (c). in a Federal court, the law of a State or Terri-
tory or Dependency of the United States so far as such law
is involved in the issue.²

Par. (d). in any court, the law of any foreign State
in so far as by former political connection it furnished a
source of legal rules for the system of law in the forum.

[[*Par. (e).* in any court, the law of all British do-
minions.]]³

Par. (f). in any court, international law, public and
private, including maritime and commercial.

ART. 4. *Political Organization and Action.* A fact of
2133 political organization or action is authorized to be judicially
noticed as follows:— (W. §§ 2574-2578.)

¹ This is not law (except by statute for the Municipal Court
of Chicago), but ought to be.

² There is here some narrowness of rule.

³ This is perhaps not law, but ought to be; and is the rule in
practice.

Par. (a). the *political action* of a *foreign State*, if internationally notorious.

Par. (b). the *open political action* of the (domestic) State, in its *international relations*.

Par. (c). the *terms* of description for the *domestic political organization*, as contained in the law defining the powers and methods of government and the duties of officers (provided the law is of a class authorized to be noticed), and the *application* of such terms

(1) to a specific *place*

(2) or, to a specific *person*,

in so far as the circumstances may justify.

Illustration. (1) That a State survey has divided a township into blocks would be noticed; but probably not that a given block in the survey includes a specific street; yet the latter location, if actually notorious, ought equally to be noticed.

(2) That a town named Ross is or is not within a county named Earleton might or might not be noticed.

(3) That a circuit court for four counties had by law but one sheriff for each county would be noticed; and that the incumbent of that office is Perry might also be noticed.

Par. (d). the *acts* of *public officers*, so far as the circumstances may justify.

Illustrations. The Federal or State census; an executive proclamation; an election of general interest; but not a sheriff's levy, nor a pound-keeper's capture of a stray dog.

ART. 5. *Courts and Judicial Proceedings.* A fact concerning
2134 the organization, incumbency, or proceedings of a court of law is authorized to be judicially noticed as follows (in addition to the rules of law mentioned in Arts. 2 and 3 above):
— (W. §§ 2578, 2579.)

Par. (a). the *jurisdiction*, organization, terms, and other details contained in legislative enactments;

Par. (b). the *rules* of practice [in superior Courts];

Par. (c). the *incumbents* of judicial office, their sheriffs, attorneys, and other officers;¹

¹ Here, of course, by Art. 1, above, notice will not invariably be taken.

cont.

1

Par. (d). the records of proceedings in the same litigation or a related one.¹

Cross-reference. (1) By Art. 2, above, the *principle of law* in any judgment in any specific case will be noticed.

(2) By Rule 126, Art. 8 (*ante*, § 778) and Rule 148C, Art. 7 (*ante*, § 1160), rules of evidence for such records are provided, and these are usually required to be resorted to.

ART. 6. *Notorious Matters of Commerce, Industry, History, Language, Science, etc.* A fact may be judicially noticed which, in view of the state of commerce, industry, history, language, science, or other human activity, is so notorious in the community that the introduction of evidence would be unnecessary. — (W. §§ 2580-2582.)

Illustrations. That July 4 is the anniversary of the Declaration of Independence; that extreme cold is apt to be experienced in railway transportation in January but not in June; that the distance between Chicago and New York is nearly 1000 miles; that a liquor termed "brandy" signifies an alcoholic liquor; that a certain J. S. is the political chief in control of local politics in the city of Rand.

2136 [[ART. 7. *Mixed Matters, presumably not Disputable.* A fact may be noticed which, does not fall within the foregoing classes, but appears (pursuant to Clause C, Art. 1, above), to be so capable of positive and exact proof, if demanded, that no imposition is likely and that notice may safely be taken.]]¹

Illustrations. That the Monday after July 1, 1899, was July 5; that Confederate government notes were never made legal tender by the Confederate government; that in 1884 trolley-cars had not superseded horse-cars in metropolitan streets; that a certain railroad had installed the block system for train-dispatching.

¹ Here again the authority is broader than is usually exercised.

² See note to § 2130.



TITLE II: JUDICIAL ADMISSIONS

(WAIVER BY STIPULATION)

RULE 231. *General Principle.* A requirement for evidence
 2140 ceases to apply where the opponent, by express stipulation
 made with the proponent for the purpose of the trial, has
 conceded the truth of a fact,
 or, assented to a specific mode of evidencing it,
 or, waived the introduction of a specific piece of evidence,
 or, waived the prohibition or the limited conditions of a
 specific rule of evidence.

Such a waiver or admission is termed a waiver by stipulation.¹ — (W. §§ 2588, 2589.)

Distinguish (1) the ordinary informal or *extra-judicial admission* (Rule 115, *ante*, § 630), which differs essentially, in not being conclusive;

(2) the party's *pleading*, which limits the issues open to controversy in the case; a waiver by stipulation assumes that the issues have been already formed by the pleadings.

(3) an *estoppel* in substantive law, which is a permanent alteration of the parties' rights, not merely a waiver relative to the particular litigation, and is further not an express mutual agreement.

ART. 1. *Effect as Conclusive of Controversy.* A waiver by
 2141 stipulation permits the fact to be taken for granted, by the
 judge, the jury, and the other party, for the purposes of the
 litigation in hand, and thus precludes controverting it either
 by evidence or by argument; with the following distinctions
 and qualifications:

Par. (a). For the party *adversely* affected by a fact
 2142 included in a waiver by stipulation, no evidence may be
 introduced to dispute the fact waived or a fact relevant
 thereto.

¹ Sometimes also traditionally termed a judicial admission or solemn admission. But the term "admission" is ambiguous.

2143 *Par. (b).* For the party *benefited* by a fact included in waiver by stipulation, [no] evidence may be introduced to prove the fact waived or a fact relevant thereto.¹ — (W. § 2591.)

2144 *Par. (c).* The waiver may relate to any *kind of fact* or mode of evidencing a fact or to any *rule of evidence*; — (W. § 2592.)

[in particular,

(1) to a relevant or material fact otherwise inadmissible;

(2) or, to a fact otherwise judicially noticeable as not true;

(3) or, to a rule of evidence constitutionally sanctioned for the benefit of the party waiving;]²

provided that no rule of public policy be involved which in the Court's estimation must be enforced irrespective of the parties' consent.

2145 *Par. (d).* The waiver is not *revocable*; but the Court by ruling may in the circumstances of the case cancel the stipulation and relieve a party from it. — (W. § 2590.)

2146 *Par. (e).* The *duration* of the waiver depends on the terms of the stipulation as made by the parties; but it must be given effect for all *subsequent stages* of the same litigation, including a new trial, unless and so far as the parties have expressly signified in their stipulation a more limited effect.³ — (W. § 2593.)

2147 *Par. (f).* The stipulation has no effect upon a *party not joining* in it.

ART. 2. *Form and Authority.* The waiver need not be made 2148 by any form of words; but it must be in substance an express

¹ Some Courts insert the "no."

² Some Courts treat these three classes as subject to exceptions; but that is unnecessary; the proviso sufficiently protects justice from impositions or abuses.

³ Courts differ here, but chiefly as to making the opposite presumption in the absence of an expressed intent as to limitation.

dispensation from evidence of a particular fact or from observance of a particular rule, and not merely an omission or withdrawal of an objection to a fact or a violation of a rule. — (W. § 2594.)

2149 *Par. (a).* The waiver need not be in *writing*, except when made out of the Court's presence.

2150 *Par. (b).* An authority to an attorney or counsel to conduct litigation *during trial* is an authority to make a waiver by stipulation.

INDEX OF TOPICS

[Numbers refer to sections §§]

A

Abbreviations; *see* Initials
 Ability, to do an act, 167, 242
 Abortion, other offences, as evidence of intent, 311
 motive for, 325
 dying declarations of woman in, 952
 who is accomplice in, 1517
 marital privilege in, 1723
 Absence of entry or record, how proved, 1230, 1244, 1155, 1453
 of maker of regular entries, 1003
 of deponent, 932
 of declarant of facts against interest, 967
 of pedigree declarant, 981
 presumption of death from, 2084
 Absent Witness, expected testimony of, received to avoid postponement, 929
 impeached like others, 501, 868
 testimony at a former trial; *see* Former Testimony
 see also Witness, XII
 Abstract, of burnt records of deeds, 1267, 781, 821, 825, 1183, 1566
 production of original, 781
 as hearsay, 1183
 as giving substance of deed, 1566
 whether preferred to oral testimony, 831
 Acceptance; *see* Bill of Exchange
 Accessory; *see* Accomplice
 Accident, cause of, as evidenced by its effects, 340-355
 insurance against, as evidence of negligence, 648, 536, 548
 see also Negligence; Intent; Highway; Machine; Premises; Corporal Injury; Res Gestæ
 Accomplice, as disqualified by his guilt, 376
 as disqualified by interest, 389
 as impeached, 547
 confession of principal used in trial of, 687
 confession of crime by, as hearsay, 971
 corroboration required, 1517

Accomplice — *Continued*

 kind of crime affected by the rule, 1517
 nature of corroborative evidence required, 1517
 who is an accomplice, 1517
 restoring credit by consistent statements, 617
 as affected by judgment of conviction of principal, 921
 see also Co-indictee
 Account, voluminous, proved by summary, 782, 797
 stated, original document in, 790
 stated, as embodying an agreement, assented to, as an admission, 666, 667
 rendered, as an admission, 671
 Account-books; *see* Books of Account
 Accused; *see* Defendant
 Acknowledgment of deed of married woman; *see* Wife
 of deeds in general, whether certificate is conclusive, 901, 905
 whether admissible, 1147
 Act, character affecting the doing of an, 131
 ability to do an, 167, 242
 done, evidenced by course of business, 170
 one criminal, not evidence of another, 219
 evidential facts arising before an, 125-186
 concurrent with an, 188-195
 after an, 196-212
 reason or motive for an, 185, 324, 1211
 made voidable by duress, 1913
 of the Legislature; *see* Statute; Legislative Journal; Recital
 see also Particular Acts; Similar Acts; Parol Evidence Rule
 Acting, expressing testimony by, 479
 Adjournment of Court, for a view, 1269
 as affecting publicity of trial, 1312
 Administrator, admissions of, 686, 688
 see also Will; Executor
 Admiralty, rules of evidence applicable in, 21

INDEX OF TOPICS

[Numbers refer to sections §§]

Admiralty — *Continued*

seal of foreign court of, presumed genuine, 1160, 1639

Admissibility, general theory of, 35

distinguished from materiality, 3

relevancy, 37-40

proof or weight, 37-40

multiple, of the same fact for several purposes, although inadmissible for another, 42-44, 220

conditional, of a fact not yet appearing relevant, 45, 300, 1360

curative, 46

judicial discretion as applied to, 49

procedure on questions of, 60-70

objection to, time and form of, 71-93

judge to determine, 2101

Admissions of a Party

1. *Whether admissible*

2. *Whether sufficient*

3. *Sundries*

1. *Whether admissible*

general theory, 630-641

not necessarily against interest, 631

distinguished from hearsay exception, 632

testimonial contradiction, 633

estoppel, 636, 2140

death not necessary, 632

distinction between arbitration and, 636

quasi and solemn, 637

prior question not necessary, 633

by conduct, 650

personal knowledge; infants, 634

made to third persons, 636

not conclusive, 635, 638, 2140

putting in the whole, 1549, 1553

implied admissions, 641

offer of compromise, 642

in pleadings, 680, 684

limitations on admissions by attorney, 680

bills and answers in equity, 682, 686

by reference to a third person, 667

by assenting to an account, 667

by flight, concealment, etc., 650-662

by silence in general, 666

silence in specific situations, 668, 670

by failure to produce evidence, 658-662

to reply to a letter, 671

by rendering an account, 671

in a third person's document, 671

corporation books, 674

affidavits and depositions used, 667

by adopting statement of third person, 677

husband or wife, 687, 697, 1713

other parties to the cause, 686

Admissions — *Continued*

administrator, 686, 688

injured person, 686

co-defendant, etc., 686

privies in obligation, 687

joint promisor, 687

agent, 687

partner, 687

attorney, 687

deputy-sheriff, 687

interpreter, 687

spouse, 687

co-conspirator, 687

joint tortfeasor, 687

privies in title, 688-697

decendent, 688

insurer, 688

insured, 688

bankrupt, 688

co-legatee, 688

co-executor, 688

grantor, 692

assignor, 692

indorser, 692

transfers in fraud of creditor, 692

after transfer, 696

as assignor of chose in action, 692

vendor of personalty, 694

as applied to negotiable instruments, 695

producing the original of a document admitted correct, 790, 807

books of bank as, 674

assessor's books as, 1101

made during possession of land, 1247, 1248

2. *Whether sufficient*

loss of a document, 762

contents of a document, 807

dispensing with the attesting witness, 864

specimens of handwriting, 1483

divorce charge, 1529

accused in general, 1530

bigamy, adultery, etc., 1542

of marriage, in civil cases, 1542

execution of a document, 1597

3. *Sundries*

distinguished from estoppel, etc., 636, 638, 2140

hypothetical, 642

independent, of a fact, 642

by another not a party, 667

interpreter as agent to make, 1287, 687

distinguished from judicial admissions, 2140

of a third person, as to fact against interest, 969

in a party's books of account, 1031

marriage certificate as, 1106

of execution of recorded deed, 1112

INDEX OF TOPICS

[Numbers refer to sections §§]

Admissions — Continued
 meaning of, may be explained, 1459
 whole must be proved, 1549, 1553
 may be proved, 1576, 1580
 answer in equity used as, 682, 686, 1584
 separate utterances excluded, 1580
 by express stipulation; *see* Judicial Admission
Adoption of child; see Family History
Of statement, as an admission, 677
Adultery, character of third person as evidence, 151
 intercourse with third persons, as evidencing paternity, 191
 on charge of, previous acts with others immaterial, 234
 venereal disease, as evidence of, 206
 plan, as evidence of, 267
 sexual desire as evidencing, 330
 other offences, as evidence of intent or motive, 330
 privilege, husband or wife, 1715, 1723
 against self-crimination in, 1732
 proof beyond a reasonable doubt, 2027
 who is accomplice in, 1520
 confession of respondent in, 1529
 eye-witness of marriage in, 1537, 1542
 admissions in, 1542
 marriage celebrant's certificate not preferred to eye-witness, 1543
 during period of gestation, inadmissible, 2080
Advancement to Child, shown by words accompanying transfer, 1246
 parol evidence to rebut presumed intent, 1982
Adverse Possession; see Possession
Advertisement, in newspaper, as evidencing knowledge, 287
see also Notice
Affection; see Criminal Conversation;
Alienation of Affections; Mental Condition, statements of; Breach of Promise
Affidavit, in interlocutory proceedings, 8
 whether *lex fori* is applicable to the taking of, 17
 satisfies witness-rule as to number, 867
 excluded at common law, 1186
 exceptions, 1186
 admissible by statute, 1187
 of a third person, as an admission, 677
 of attesting witness to will, 872
 of party, to loss of document, 762
 filed original, required, 778
 jurat as evidence of, 1147
 of juror impeaching verdict, 1947

Affidavit — Continued
 presumed genuine, in official files, 1630
 from identity of name, 2082
Affirmation; see Oath
Against Interest, statements of facts
 admissions not necessarily, 631, 632
 exception to the Hearsay rule, 966
 witness unavailable from death, absence, insanity, 967
 receipt for money, 967, 970
 admissions of third persons, 969
 proprietary interest, 969
 landlord and tenant, 968
 pecuniary interest, 970
 indorsements, receipts, 970, 975
 sundry interests, 972
 penal interest; confession of crime, 971
 no motive to misrepresent, 973
 debit and credit entries, 973
 subsequent and separate entries excluded, 974
 statement, admissible for all facts stated, 974
 time of statement, 975
 mode of proof, 973, 977
 statement, may be oral or written, 977
 death or absence of declarant, 967
 testimonial qualifications of declarant, 976
 authentication of statement, 978
Age, as affecting an infant's disqualification, 370
 as evidenced by appearance, 245, 285, 404, 730, 739
 of a witness, as impeaching him, 526
 of a document; *see* Execution of Documents
 as excusing absence of attesting witness, 875
 of deponent, 935
 statement of age, as hearsay; *see* Family History
 testimony to one's own, 411
Aged Witness, deposition may be taken, 935
Age of Consent in rape, consent immaterial, 330
 appearance, to evidence, 730
 woman not accomplice, in rape under, 1517
Agency, course of business in, as evidence of a transaction, 171, 317, 319
 words accompanying acts to determine, 1246
 opinion testimony to, 1455
 proof of authority to execute ancient deed, 1617
 presumption of continuance of, 2083
see also Agent
Agent, fraud by, as evidence of party's guilt, 656

INDEX OF TOPICS

[Numbers refer to sections §§]

Agent — Continued

disqualification of opponent as witness to a transaction with a deceased, 391, 1045, 1522
 wife or husband testifying to acts as agent, 396
 offer of compromise by, 642
 admissions by, in general, 687
 notice to produce to, 769
 words accompanying acts as, 1246
 privileged communications of, 1775, 1796
 parol agreement to hold only as, 1934
 personal liability of one who signs as, 1934a
 authority to execute not presumed, 2069

see also Agency

Agreement, collateral, shown by parol, 1931

novation, alteration, waiver, 1938

subsequent agreements, 1938

see also Contract; Assent; Document; Parol Evidence Rule; Collateral Agreements

Alcohol; *see* Liquor

Alibi, mode of evidencing, 192a

perjury or subornation in proving, 654

failure to prove, as evidence of guilt, 654

burden of proof of, 2066

Alien, disqualification as a witness, 374

necessity of interpreter, 496

qualifications of interpreter, 387

credibility impeached by his race, 527

conclusiveness of immigration-inspector's certificate, 906

adequacy of cross-examination in foreign language, 927

see also Race; Interpreter; Oath

Alienation of Affections, expressions of husband or wife showing feelings, 1212

character of wife, as cause for cessation of affection in, 325

marital privilege in, 1723

see also Criminal Conversation

Allegans suam turpitudinem, as excluding testimony, 376

Almanac, used in evidence, 1174

judicially noticed, 2120

Alteration, of entries, fraudulent intent in; *see* Fraud

expert witness to, 1491

shown by parol, 1938, 1950

liability on altered document, 1907

time of, presumed, 2069

Ambiguity in a document, 1978

latent, in a will, 1976

Ambiguous Question; *see* Question to a Witness

Ambassador, deposition of, 918, 936

Ambassador — Continued

privilege of, 1689

Amendment; *see* Fourth Amendment

Analytic Rules defined, 745

Ancestors, insanity of, as evidence, 263

expectation of life evidenced by life of, 248

declarations of, as evidence;

Family History; Admissions

Ancient Boundary; *see* Boundaries

Ancient Document, as evidence of;

session of land, 203

calling the attesting witness to, 1614

lost original, 1614
 proof of genuineness; *see* Execution of Documents

Ancient Writings; *see* Writing

Animal, character of, as evidence, 1230, 1078

trespass of another, as evidence, 1593

brands on, as evidence, 198, 1593

conduct of, as evidence of ownership or crime, 212, 730

as evidence of the animal's position, 230

bloodhound in tracking accused, 212

precautions taken with, to show knowledge of viciousness, 647

symptoms of injury, etc., as evidence of cause, 352

fright of, as evidence of danger to object, 355

cruelty of treatment, as affected by other like methods, 355

proof of owner's knowledge of viciousness, 283, 647

injuries to, as evidencing a high defect, 353

condition at other times, as evidence, 340

produced before the jury, 730, 733

disposition or pedigree of, evidenced by reputation, 1078

corporeal traits of, to evidence pedigree, 210

printed stock-book, to prove pedigree, 1180

personal knowledge, to evidence position, 1470

value of; *see* Value

Anonymous crimes, as evidence of intent, 299

Answer of Witness, to a leading question, 463

non-responsive, 475, 925

prepared beforehand, in a deposition, 493

by reference to other testimony, 493
see also Question; Examination

Objection

Answer in Chancery, as a party's admission, 682, 686, 1584

original's production not required, 778

INDEX OF TOPICS

[Numbers refer to sections §§]

Answer — Continued

giving discovery, scope of; *see* Discovery
proof of bill and answer together, 1571
responsive parts are evidence, 1584
presumed genuine, in official files, 1630

from identity of name, 2082

Apparatus, possession of, as evidence of a crime, 168, 267
defects of, as evidence of negligence, 344

Appeal, evidence excluded because not transmissible on, 739
record of preliminary probate, not evidence on, 1118

Appearance

as evidence of age, 245, 285, 404, 730
intoxication, 265, 285, 730
competence as workman, 730
health, 246
identity, 285, 730
lunacy, 730
paternity, 739

of wound, to indicate distance of assailant, 352

as affected by opinion rule, 1461

Appliances; *see* Machine

Appointment

of officer, presumed, 2089

Appraiser, report of an, 1130

Arbitration, distinguished from an admission, 636

Arbitrator, former testimony before, whether admissible, 914

as a witness, 1404

not to impeach award, 1947

misconduct of, to invalidate award, 1947

Argument, distinguished from evidence, I, 1272

form of, is inductive, 117

practical requirements of the, 117

case stated for, 683

improper statements by counsel in, 1272

offering evidence after argument begun, 1367

Arrest, belief of officer as to probable cause, 289

conduct under, as evidence of guilt, 650, 668, 670

resistance to, as evidence of guilt, 652

submission to, as evidence of innocence, 294, 665

confession made under, 717

impeachment of a witness by, 553, 555, 556

silence under, as an admission, 668

immunity of witness from, 1671

Arsenic; *see* Poison

Arson, threats as evidence of, 178

materials and tools, as evidence of, 197, 267

Arson — Continued

other offences, as evidence of intent, 310

motive for, as shown by circumstances, 325, 326

as shown by conduct, 329

proof beyond reasonable doubt, in insurance, 2027

see also Insurance

Assault, similar acts to show intent in, 312, 329

see also Rape; Indecent Assault; Homicide

Assent, shown by parole evidence; *see* Parole Evidence Rule

see also Contract; Admissions

Assessment, privilege against disclosure of, 1837

Assessor's Books, production of original, 791

admissible as official records or as admissions, 1101

admissible to prove occupancy, 1101

ownership, 1101

property value, 1101

lack of property, 1101

copy of whole required, 1569

Assignee in bankruptcy; *see* Bankrupt

Assignment, of patent of invention, 781

record of, 1117

Assignor, admissions of, against assignee, 692

see also Vendor

Assumpsit; *see* Contract; Bill of Exchange; Loan; Note

Asylum; *see* Sanity

Atheism; *see* Religious Belief; Witness

Attendance as witness; *see* Witness, IX

Attested Copy; *see* Certified Copy

Attesting Witness

1. Rule requiring attesting witness to be called

2. Rule permitting attestation to be evidence

3. Sundries

1. Rule requiring attesting witness to be called

kind of document, 852

document collaterally in issue, 855

who is an attesting witness, 853

official signature is not, 853

document used for other purposes, 854

execution not disputable because of estoppel, admission, etc., 857

attester preferred to maker, 863

attester preferred to admissions, 864

to opponent's testimony, 865

attester denying or not recollecting, 866

other witnesses not excluded, 866

INDEX OF TOPICS

[Numbers refer to sections §§]

Attesting Witness — *Continued*

number of attesters required to be called, 868, 1508
affidavit or deposition satisfies witness-rule, 867
number of signatures to be proved of attesters, 884
of maker, 883
proof of signature dispensed with, 885
excuses for not calling the attester, 869, 880

death, 870
ancient document, 870, 1609
absence from jurisdiction, 872
proponent's knowledge of intended absence of, 872
effort to secure deposition of absent, 872
inability to find, 873
name unknown, 874
age, 875
illness, 875
imprisonment, 876
incompetence by interest, etc., 877
production of, excused for blindness, 877
refusal to testify, 878
privilege from testifying, 878
copy of recorded document, 879

2. Rule permitting attestation to be evidence

exception to the Hearsay rule, 1000
implied purport of attestation, 886
proof of maker's signature also, 887

attester may be impeached or supported, 1001
prima facie effect of, 2041

3. Sundries

disqualified by confession of falsehood, 377
by interest, 393
testifying without recollection, 433
may be impeached by proponent, 515

by self-contradiction, 582
opinion to sanity, 1430
privilege of attorney, as attester, 1795, 1807
parol evidence to explain signature of, 1878
attestation as a required formality, 1950

Attorney, testimony to value of services of, 424, 1435
improper consultation with witness before trial, 459
offer of compromise by, 642
pleading drafted by, as an admission, 680, 684
admissions by, in general, 680, 687
judicial admissions, 2148
competency as a witness, 1406

Attorney — *Continued*

notes of testimony taken by, 1139
consultation with sequestered witness, 1316

exclusion from court while a witness, 1318

statement of, that matter is privileged, 1801

office of, judicially noticed, 2133

power of; *see* Agency

privilege of, as attesting witness, 1795, 1807

privileged communications of; *see* Attorney and Client

see also Counsel

Attorney and Client, Communication between,

policy of the privilege, 1765

irrespective of litigation, 1767

non-legal purposes, 1768

prosecuting attorneys, 1768

conveyancing, 1770

wills, 1770

criminal transaction, 1771

protects past but not future wrong doing, 1771

persons not attorneys, 1774
attorneys' clerks and agents, 1775

client's belief, 1776

attorney as a friend, 1777

casual consultation, 1777

time of consultation, 1778

communications made during negotiation of relation, 1778

communications, not conduct, 1780

documents, 1781-83, 1797

distinction between pre-existing and subsequently drawn documents, 1781

production of documents, 1781

contents of pre-existing documents, 1782

signing of note or receipt, not privileged, 1783

relevancy of communication, 1786

confidential nature, 1787

third person present, 1787

joint attorney; opponent's presence, 1787

identity of client, 1793

purpose of suit, 1793

execution and contents of will or deed, 1794

temporary confidentiality, 1794

attorney as attesting witness, 1795

communications by third person, 1796

client's agents, 1796

client's documents, 1797

reports by medical agent, 1797

reports of accidents, 1797

privilege is the client's, 1798

who may claim, 1798

inference from claim, 1801

INDEX OF TOPICS

[Numbers refer to sections §§]

Attorney — Continued
 attorney's statement that matter is privileged, 1801
 indirect disclosure by attorney, 1804
 third person overhearing, 1804
 waiver by testifying, 1808
 by agent or assignee, 1807
 by deceased client's representative, 1807
Auditor, findings of an, 1130
Authentication of a document; *see*
 Execution; Certified Copy
Authority as agent; *see* Agency
 opinion testimony to, 1455
 person in, obtaining a confession;
 see Confession
 to certify copy, 1152
 of officer, presumed, 2089
 judicially noticed, 2133
Authorship; *see* Execution
Automobile, evidence of ownership and
 operation, 198
Autoptic Preference; *see* Real Evi-
 dence
Award; *see* Arbitrator

B

Bailee, loss by, presumed negligent,
 2061
 speedy complaint by, of robbery, 627
 document deposited with, as original,
 783, 790
Ballot, production of original, 791
 disclosure of, privileged, 1700
 destruction of, unopened, 1700
 mistake shown by parol, 1911
 must be in writing, 1945
Bank, books of, original required, 780
 books of, as an admission, 674
 incorporation of, proved by repute,
 1087
 attested copy admitted, 1163, 1187
 see also Books of Account
Bank-note, forgery of, as evidence of
 intent, 302
 expert witness to, qualifications of,
 385, 420
 person whose name is forged, not a
 preferred witness, 897
Bank-officer, as an expert witness to
 genuineness of notes, 385
 not a preferred witness, 897
 communications to, not privileged,
 1762
Bankrupt, admissions of, 688, 697
 answer as act of bankruptcy, 1242
 declarations of intent by, 1210, 1252
 privilege of husband or wife of, 1715
 against self-crimination by, 1732,
 1736, 1754
Barrator, other acts, to evidence a
 common, 232
Bastardy, third person's character, as
 evidence, 151
 third person's intercourse, as evi-
 dence, 191

Bastardy — Continued
 resemblance of child, as evidence of
 paternity, 209, 730
 notorious reputation of putative fa-
 ther's recognition, 155, 1069
 procurement of abortion, as evidence
 of paternity, 647
 sexual desire as evidencing, 330
 prior intercourse, as evidence of mo-
 tive, 330
 mother's complaint in travail, 626
 uncorroborated complainant in, 1520
 using the mother's examination, 945
 family hearsay as evidence, 990
 parent's testimony to, 398, 1521
 proof beyond a reasonable doubt,
 2027
 presumption of legitimacy in, 2080
 see also Father; Legitimacy;
 Mother
Battery, plaintiff's reputed good char-
 acter in, 158
 see also Homicide; Schoolmaster
Beer, meaning of, judicially noticed,
 2135
Belief, testifying to one's own belief
 or intent, 392
 belief as distinguished from knowl-
 edge, 403
 testifying to another's belief or in-
 tent, 404
 belief or impression, as showing suf-
 ficient memory, 428
 conduct and circumstances as evi-
 dence of; *see* Knowledge
Beneficiary of insurance; *see* Insur-
 ance
Best Evidence, meaning of rule, 746,
 850
 rule for producing originals; *see*
 Original Document
 rule for attesting witness; *see* At-
 testing Witness
 rule against hearsay; *see* Hearsay
 Rule
Bias, securing experts without, 1991
 former hostility to show, 329
 impeaching one's own witness by
 proof of, 506
 mode of evidencing, in general, 532
 effect of witness admitting, 535
 relationship, employment, etc., 536,
 548
 detective impeached for, 536, 548
 expressions and conduct, 537, 1212
 details of a quarrel, 538
 preliminary inquiry, 539
 contradiction by other witnesses, 570,
 577
 restoring credit by consistent state-
 ments, 617
 see also Interest; Corruption
Bible, as evidence of pedigree; *see*
 Family History
Bigamy, other offences, as evidence of
 intent or motive, 330

INDEX OF TOPICS

[Numbers refer to sections §§]

Bigamy — Continued

disqualifying the wife as witness, 396
 eye-witness of marriage required, 1537
 admissions of defendant sufficient, 1542
 marriage celebrant's certificate not preferred to eye-witness, 1543
 proof by husband or wife, privileged, 1711
 valid marriage presumed, 2059
 Bilateral Acts; *see* Parol Evidence Rule, B
 Bill in Chancery, as a party's admission, 682
 must be read with the answer, 1571
 see also Chancery
 Bill of Discovery; *see* Discovery
 Bill of Exceptions, must exhibit grounds of objection, 60, 71
 as evidence of former testimony, 1138
 Bill of Exchange, evidence of forgery of; *see* Forgery
 authority to accept, other transactions as evidence of, 317
 impeaching one's own instrument, 377
 admissions of parties to, 695
 production of original; *see* Original Document
 indorsement on, as statement against interest, 970
 delivery in escrow, shown by parol, 1892, 1908
 collateral agreement, shown by parol, 1934a
 signed by mistake, 1898-1907
 parol acceptance, 1945
 presumption of title from possession of, 2067
 of payment, 2068
 protest of, as evidence; *see* Notary
 Bill of Lading, assent presumed, 2093
 shown by parol, 1898
 terms varied by parol, 1927
 presumption of excepted loss in, 2062, 2093
 see also Contract
 Bill of Legislature; *see* Statute; Legislative Journal
 Birth, register of; *see* Register of Marriage, Birth, and Death
 date of; *see* Age
 declaration of, by deceased person; *see* Family History
 reputation of, 1069
 see also Race; Legitimacy
 Birthmark, as evidence of events in pregnancy, 206
 Black; *see* Race
 Blackmail, other offences as evidence of intent, 309
 Blank, delivery of document having a, 1893, 1907

Blank — Continued

interpretation of a, 1979
 indorsement in, 1934a
 Blindness, as disqualifying a witness, 367
 Blood, witness' experience with, qualifying him, 384
 opinion testimony to, 1462, 1464
 explaining away traces of, 117, 118
 absence of, stains, 197
 Bloodhound, use of, in tracking, accused, 212
 character or conduct of; *see* Intention
 Animal
 Blotter-press copies, as originals, 784
 Bodily Injury; *see* Corporal Injury
 Body, inspection of, 730, 1662, 1704, 1739, 1991
 Bona Fides; *see* Knowledge; Motive
 Intent
 Bond, proof of execution of; *see* Execution of Document
 as impeaching the obligor-witness, 548
 production of original; *see* Original Document
 as part of the court files, 778
 indorsement on, as statement against interest, 972, 975
 Bookkeeper, entries of; *see* Regular Entries
 aiding recollection by entries; *see* Recollection
 Books of science, used in evidence, 1170
 of election as evidence, 1101
 of history, used in evidence, 1170
 see also Document; Books of Account; Printed Matter; Learned Treatises
 Books of Account,
 used to aid recollection; *see* Recollection
 of a bank, original required, 780
 of parties or deceased persons, as hearsay; *see* Regular Entries
 distinguished from records of corporation, 1121
 of a corporation or partnership, as admissions, 674, 1031
 production of original, 780
 offered by surviving party against deceased opponent, 1029
 admissions in, to impeach evidence, 1031
 parol evidence rule not applicable to, 1032
 inspection of, before trial; *see* Discovery
 putting in the whole, 1581
 making evidence by inspection, 1589
 privileged from production, 1662, 1686, 1762
 see also Original Document
 Borrowing; *see* Loan; Debtor

INDEX OF TOPICS

[Numbers refer to sections §§]

boundaries, evidenced by possession, 318
 surveyor's testimony not required, 897
 deceased persons' declarations
 exception to Hearsay rule, 1035
 Massachusetts doctrine, 1037
 death of declarant, 1036
 insanity, etc., not sufficient, 1036
 no interest to misrepresent, 1035
 owner's declarations, 1035
 declarations on the land, 1037
 declarant's knowledge, 1038
 maps, surveys, 1039
 opinion testimony to, 1458
 ancient deed-recital of, 1040
 reputation about
 must be question of past generation, 1053
 kind of reputation, 1052
 must be more than individual assertion, 1060
 must be of right itself and not of specific instance, 1056
 must relate to matter of general interest, 1054
 application of reputation rule to private, 1054
 form of reputation, 1060
 official surveys, to prove, 1133
 of county or town, judicially noticed, 2133
 Brands on animals, or timber, as evidence of ownership, 198, 1593
 proving genuineness of, 1593
 register of, 150, 1593
 Breach of Promise of marriage, character of plaintiff as in issue or mitigating damages, 156, 160
 acts of unchastity, as excusing or mitigating, 235, 239
 prior relations, as evidence, 330
 state of affection inferable in, 330
 defendant's wealth, provable by repute, 1085
 plaintiff's conduct, as *res gesta*, 1242
 opinion testimony to damages by, 1435
 uncorroborated complainant in, 1520
 Bribery, by a party, as evidence of guilt, 654
 other offences, as evidencing intent, 307
 offer of money to injured party in criminal prosecution not, 642, 654
 used to impeach one's own witness, 506
 attempt to, as impeaching a witness, 542
 contradiction as to, not collateral, 570, 577
 who is an accomplice in, 1517
 Bridge, defective; *see* Highway
 Brief of Evidence, to prove former testimony, 1138

Building, other injuries to, 350
 see also Premises
 Bullet, shown to fit gun of accused, 197
 Burden of Proof, and Presumptions
 1. *General Principles*
 2. *Burdens and Presumptions in Specific Issues*
 1. *General Principles*
 production of evidence by the parties, 1990
 evidence sought by the judge *ex mero motu*; questions to witnesses by the judge, 1990
 (a) *burden of proof*; first meaning: risk of non-persuasion of the jury, 1994
 test for this burden; negative and affirmative allegations; facts peculiarly within a party's knowledge, 2035
 second meaning: duty of producing evidence to the judge, 1997
 test for this burden, 1999
 shifting the burden of proof, 1999
 (b) *presumptions*; legal effect of a presumption, 2012
 conflicting presumptions; counter presumptions, 2014
 (c) *prima facie evidence*; sufficient evidence for the jury; scintilla of evidence, 2002
 direction of a verdict, motion for a non-suit, distinguished, 2006
 waiver of motion by subsequent introduction of evidence, 2015
 (d) *measure of persuasion*: proof beyond a reasonable doubt; rule for criminal cases, 2023
 proof by preponderance of evidence; rule for civil cases, 2027
 2. *Burdens and Presumptions in Specific Issues*
 (a) *sanity*: testamentary and other civil causes; suicide, 2041
 criminal causes, 2045
 (b) *undue influence and fraud*: testamentary causes, 2046
 confidential relations of grantee or beneficiary, 2047
 fraudulent conveyances against creditors, 2048
 (c) *marriage*: consent, from cohabitation or ceremony, 2055
 capacity, as affected by intervening death, divorce, or marriage, 2059
 (d) *negligence and accident*: contributory negligence, 2060
 loss by bailee, 2061
 defective machines, vehicles, and apparatus, 2062

INDEX OF TOPICS

[Numbers refer to sections §§]

Burden of Proof — *Continued*

- death by violence, 2063
 - (e) *crimes*: innocence, malice, guilt, etc., 2064
 - self-defence, 2066
 - alibi, 2066
 - possession of stolen goods, 2066
 - capacity (infancy, intoxication, coverture), 2065
 - (f) *ownership*: possession of land and personalty, 1249, 2067
 - possession of negotiable instrument, 2067
 - (g) *payment*: lapse of time, 2068
 - possession of instrument, 2068
 - (h) *execution and contents of document*: letters and telegrams, 2069
 - execution of deeds (delivery, date, seal), 2069
 - ancient documents, 2069
 - lost grant or other document, 2069
 - lost will (contents and revocation), 2069
 - spoliation of documents, 2069
 - alteration of documents, 2069
 - (i) *miscellaneous*
 - legitimacy, 2080
 - chastity, 2081
 - identity of person (from name, etc.), 2082
 - continuity; in general, 2083
 - life and death, 2084
 - survivorship, 2084
 - seaworthiness, 2085
 - regularity; performance of official duty and regularity of proceedings, 2088
 - appointment and authority of officers, 2089
 - incorporation, 2090
 - similarity of foreign law, 2091
 - contracts, bill of lading, 2093
 - of showing performance of a condition precedent, 2093
 - statute of limitations, 2094
 - malicious prosecution, 2095
 - reduction of agreement to writing, 1941
 - confessions, 723
 - of accomplice, 1517
 - qualifications of witness, 363, 369, 371, 380, 393, 401
- Burglary, tools, etc., as evidence of, 197, 200, 267
- possession of stolen goods, as evidence of, 200, 2066
- other crimes as evidence of intent, 309
- motive for, 325
- evidence of identity, 334
- Burnt Records, abstract of, 781, 821, 1183, 1366
- Business, course of, as evidence of a transaction, 171, 320

Business — *Continued*

- amount of, as evidence of nuisance, value, etc., 356
- prudence in matters of, as evidenced by acts of others, 355
- stock of goods in, as evidence of amount of, 355
- loss of patronage of, as evidence of injury, 356
- entries in the course of; *see* Regular Entries
- By-law; *see* Best Evidence
- Bystander, exclamations of, during *res gesta*, 1236

C

- Calendar, used in evidence, 1174
- Calling a Witness, what constitutes, on direct examination, 1378
 - out of the usual order; *see* Examination, III
 - as preventing impeachment; *see* Impeachment
- Capacity, physical, as evidence of an act done, 167
 - distinguished from tendency, possibility, cause, 346
 - instances of human conduct, to evidence, 241
 - of a weapon, machine, etc., as shown by its effects, 342-355
 - of testator or grantor, 1454, 2041
 - of accused, 1454
 - presumption of, in marriage, 2059
 - in testamentary cases, 2041
 - in criminal cases, 2065
 - mental, of a party; *see* Sanity: Undue Influence; Testator
 - testimonial, of a witness; *see* Witness, I, *Qualifications*; Child
- Capital of a State or county, noticed, 2133
- Car; *see* Vehicle
- Carbon Copy; *see* Typewriting
- Carefulness, presumption of, 2060, 2063
 - jury may use general knowledge to determine, 2127
 - opinion as to, 1445
 - see* also Negligence; Skill; Conduct
- Carriage; *see* Vehicle
- Carrier, wife of plaintiff, as witness against, 396
 - loss by, presumed negligent, 2061
 - see* also Bill of Lading
- Case Closed, calling a witness after; *see* Examination
- Case Stated for argument, 683
- Cash, regular entry to prove payment of, 1020
- Cattle, brands as evidence, 198
 - see* also Animals
- Cause of an illness, injury, explosion,

INDEX OF TOPICS

[Numbers refer to sections §§]

Cause — Continued
 accident, etc., as evidenced by its effects, 340-355
 distinguished from tendency, capacity, possibility, 346
 expert opinion as to, 1463
 Census, as evidence of population, 1143
 judicially noticed, 2133
 Ceremony of marriage, presumed valid, 2059

Certificate

- (a) *in general*
 contradicting one's own official, 377
 admissible when made by authority
 sundry officers, 1145
 distinguished from return, 1145
 private persons, 1145
 of effect of the record, 1146
 notary's protest, 1146
 deed-acknowledgment; oath, 905, 1147
 of deposition, 1147
 certified copy, 1152-1163
 printed copy, 1164, 1622
 authenticated by seal or signature, 1633
 presumed correct, 2088
 whether conclusive for
 married woman's acknowledgment, 901
 election, 904
 oath, 905
 acknowledgment, 905
 of immigration inspector, 906
- (b) of *land-grant*; *see* Deed
- (c) of *entry* of land-title; *see* Deed
- (d) of *location* of land-patent; *see* Deed
- (e) of *marriage*
 constitutionality of, as evidence, 929
 in criminal case, 1537
 made evidence by party's possession, 293
 admissible as a public document, 1106
 not required in bigamy, etc., 1543
 presumed genuine, from custody, 1630
 conclusive, under parol evidence rule, 1946

Certified Copy

1. *Public Documents*
2. *Private Documents*
1. *Public Documents*
 scope of authority to certify, 1152
 time and manner of certifying, 1152
 certificate of effect, or non-existence, 1155

Certified Copy — Continued

- authentication of certified copy, 1158
 kinds of documents thus provable,
 sundry public records, 1152
 judicial records, 1160
 probate of wills, 1160
 lost deeds, 1161
 copy of whole required, 1566
 attested by seal, 1633
 whether preferred to sworn copy, 831
 distinction between, and sworn copy, 1116
 excusing from production of attesting witness, 879
2. *Private Documents*
 bank-books, 1163
 corporation records, 1163
 parish registers, etc., 1163
 see also Copy
- Chancery, rules in, distinguished from rules at law, 8
 rules in, as affected by Federal statutes, 21
 trials in Federal Courts of, 21
 special rule for depositions, 945
 for cross-examining to character, 552
 for one witness to a bill, 1507
 bill or answer in, as an admission, 682, 1584
 proving the whole of a decree, 1570, 1571
 responsive parts of answer as evidence, 1584
 discovery from opponent in, 1332, 1335, 1702
 privilege of witness against self-crimination in, 1745
 see also Discovery
- Character
 In general, distinguished from reputation, 128
 conduct to evidence, as distinguished from relevancy of character itself, 129
 1. *As Evidence or In Issue*, 128
 (a) *Accused's character* as relevant to show an act done or not done, 131
 general, distinguished from particular acts in rape, 138, 229
 distinguished from habit, 170
 course of conduct distinguished from, 232
 good character always admissible for him, 136
 presumed, 660
 bad character not admissible against him, 137
 prosecution may rebut, 137
 kind of character, 131
 evidence of, must be in reference to specific trait in issue, 131

INDEX OF TOPICS

[Numbers refer to sections §§]

Character — Continued

- time of character, 135
- place of character, 135
- accused as witness, 502
- failure to prove, as evidence of bad character, 660
- of arrested person to show reasonable ground for suspicion in arrest by officer, 289
- to justify breach of promise, 160
- houses of ill-fame and inmates, 163
- in seduction, 165, 239
- of employee as affecting liability of employer, 161
- (b) *Animal*, 152, 230
- (c) *Complainant in rape* and similar crimes, 138
- for chastity, presumption of, 2081
- (d) *Deceased in homicide*, to evidence aggression 141-144, 278
- (e) *Parties in civil cases* in general, 142, 146, 147
- in negligence, 148
- in defamation, 149
- in malpractice, 150
- of father and daughter in father's action for seduction, 239
- of husband and wife in action for criminal conversation, 239
- of plaintiff in action for indecent assault, 239
- (f) *Plaintiff, in mitigation of damages*, 155-158, 239
- in issue for sundry purposes, 160, 161
- (g) *Third persons* in general, 151
- (h) *Witness impeached*
- one's own witness, 505
- actual character, 518
- kind of character, 518
- other traits than veracity, 520
- time of character, 521
- place of character, 521
- mode of evidencing by conduct; *see infra*, 2
- mode of evidencing by reputation; *see infra*, 2
- character as to sanity, skill, etc.; *see Impeachment*
- attesting witness, 1001
- (i) *Witness supported*
- good character, in general, 596
- attesting witness, 1001
- 2. *Mode of Evidencing by Conduct*
- (a) *In general*
- of an accused in a criminal case, 219-223
- unfair surprise in showing, 218, 231, 1326
- rumors of misconduct as affecting credibility of witness' testimony concerning, 223

Character — Continued

- privilege not to disclose crime, 1740
- see also Self-crimination*
- of a deceased in homicide, 221
- of a negligent party in a case, 228
- of a complainant in rape, 229
- of an animal, 152, 230
- (b) *Of a party*, to show character in issue, 231-238
- to mitigate damages, 239
- (c) *Of a witness, in impeachment*
- by other witnesses, 550
- by conviction of crime, 555
- by cross-examination to misconduct, 552
- privilege for crimes, 1740
- rumors of misconduct, 557
- contradiction by other witnesses, 570
- form of question in impeachment, 1471
- unfair surprise in showing; *see Unfair Surprise*
- (d) *Of a witness, in support*
- good character, 596
- impeaching the impeaching witness, 605
- explaining away bad reputation, 608
- denial of crime, 608
- consistent statements, 613
- 3. *Mode of Evidencing by Reputation*
- general principle of reputation, 1071
- extent and place of reputation, 1072
- absence of utterances to evidence good, 1073
- reputation outside of place of residence, 1075
- time of reputation, 1076, 1077
- kind of character that may be thus proved
- chastity, 1078
- house of ill-fame, 1078
- common offender, 1078
- sanity, 1078
- temperance, 1078
- expert qualifications, 1078
- negligence, 1078
- animals, 1078
- solvency, 1085
- partnership, 1086
- legal tradition, 1087
- incorporation, 1087
- sundry facts, 1087
- limitation of number of witnesses, 1401
- qualifications of a witness to reputation, 417
- 4. *Mode of Evidencing by Personal Opinion*
- defendant's moral character, 1469

INDEX OF TOPICS

[Numbers refer to sections §§]

Character — *Continued*

witness' moral character; belief on oath, 1471

skill, care, competence, 1470

see also Unfair Surprise; Impeachment of a Witness; Chastity

Charge to Jury, right of judge to give, 11, 2006, 2113

party offering evidence after, 1367

Charge and Discharge statements taken together, 1579

Charter of city, judicially noticed, 2131

of corporation proved by copy, 1152

Chastity, character of complainant in rape, etc., to show consent, 138

character of the woman in seduction, etc., as mitigating damages or in issue, 156

conduct, to evidence rape-complainant's character for, 229

mitigation of damages, as affected by lack of, 239

character in issue, as involving acts of unchastity, 233

provable by reputation, 1078

presumption of, 2081

of a witness, in impeachment; *see* Impeachment

Chattel, possession of stolen; *see* Stolen Goods

failure to produce, as evidence, 662

value, as evidence of price agreed, 326

marks, as evidence of identity, 198, 334

identified from appearance, 404

sales of other goods, as evidence of value, 357

condition or quality of, as shown by effects, etc., 340-355

qualifications of a witness to value; *see* Value

whether production in court is necessary, 748, 749

words accompanying delivery of, 1246

inspection of, before trial, 1339, 1343

obtained by illegal search, 1656

inspection or production of, compelling, 1662, 1705, 1738

Cheat, other acts, to evidence a common cheat, 332

to evidence intent, 303

see also False Representations

Check, evidence of forgery of; *see* Forgery

parol transaction collateral to instrument, 790, 798, 1934a

see also Bill of Exchange; Payment; Document

Chemical Matters, witness' experience as qualifying him, 384

opinion testimony to, 1462

Chief, case in; *see* Examination, III

Chief — *Continued*

examination in; *see* Direct Examination

Child, resemblance of, to show paternity, 209, 730, 739

appearance of, to evidence age, 245, 285, 404, 730

capacity to testify, 370

to take the oath, 1292, 1289

to testify, though not capable of perjury, 1131

corroboration required as witness, 1523

see also Advancement; Age; Infant; Legitimacy

Childbearing, presumption against, 2081

Chinese as witness; corroboration required, 1523

exclusion of, 374

see also Race

Chose in Action, admissions of assignor, 692

Church, register of; *see* Register of Marriage, Birth, and Death

Circumstantial evidence, defined, 109

distinguished from testimonial evidence, 109

relative value of, 115

general theory of, 118

classification of, 124

may be proved by the same kind, 122

criminal's identity as evidenced by traces, 196

distinguished from *res gesta*, 1200

confusion of issues in, 1383

unfair prejudice in, 1390

sufficiency for *corpus delicti*, 1536

to authenticate a document, 1596

proof beyond reasonable doubt, 2023

City charter, ordinance, boundary, etc., judicially noticed, 2131, 2133

ordinance proved by printed copy, 1164, 1622

Civil cases, parties in, character of, 142, 146, 147

eye-witness to marriage not required in, 1542

marriage celebrant's certificate not preferred to eye-witness in, 1543

similar acts, to evidence Knowledge, Design, or Intent in, 315

Claim of Title, as part of *res gesta*, 1247

Classification of the rules of evidence, 2

of circumstantial evidence, 124

of the rules of relevancy, 112

of prospectant evidence, 125

Clergyman, confession to, not excluded, 713

privileged communications to, 1870

entries of; *see* Regular Entries; Register

Clerk using an entry to aid recollection

INDEX OF TOPICS

[Numbers refer to sections §§]

- Clerk — *Continued*
tion; *see* Recollection
entries of a deceased; *see* Regular
Entries
of public officer or court; *see* Certified Copy
of an attorney, admissions of, 680
signature presumed genuine, 1639
communications to, not privileged,
1762, 1775, 1796
- Client,
privileged communications of; *see*
Attorney and Client
see also Attorney; Attorney and
Client; Parties
- Close of Case, evidence offered after;
see Examination, III
- Clothing, as evidence of identity, 334,
404
testimony to value of; *see* Value
exhibition to jury, 231
- Co-conspirator, admissions of, in gen-
eral, 687
see also Accomplice
- Co-defendant, impeached, 547, 546
admissions of, 686
husband or wife of, privileged, 1717
accused's failure to call, 1748
see also Defendant; Co-indictee
- Co-indictee, disqualification as witness,
389
wife of, disqualification as witness,
396
impeachable when called by co-party,
514
impeached by his situation, 547
admissions of, 686
see also Accomplice
- Co-obligee, admissions of, 688
- Co-obligor, admissions of, 687
- Co-party, admissions of, 686
see also Co-defendant; Co-indictee;
Party
- Co-promisee, admissions of, 688
- Co-promisor, admissions of, 687
- Co-tortfeasor, admissions of, 687
- Cohabitation, as evidence of marriage,
293, 1537
as evidence of adultery, etc.; *see*
Adultery; Incest; Marriage
presumption of marriage from, 2055
- Coin, evidence of counterfeiting; *see*
Counterfeiting
- Counterfeiting
expert witness to genuineness of,
385
- Collateral Agreements, to written con-
tracts, 1931, 1935
shown by parol, 790, 798, 1934a
- Collateral evidence, admitted to rebut
other collateral evidence, 46
inadmissible when irrelevant, 120
of crimes, to show intent, etc., 220,
297
facts, misuse of doctrine, 800
facts, doctrine of, in producing
originals, 806
- Collateral evidence — *Continued*
contradiction of witness by;
Contradiction; Self-contradiction;
privilege of a witness against;
grace by, 552
unfair surprise in impeachment;
witness by, facts, 567, 571
test of collateralness, 568
contradiction as to bribery not, 577
contents of a document collateral
in issue, 806
attesting witness to a document col-
laterally in issue, 855
- Collision, other instances, as evi-
dencing a defect, 353
spontaneous exclamations of one =
a, 1233
see also Negligence
- Color, as impeaching a witness
evidencing race; *see* Race
- Color of Title, deed admitted as, 1116,
1247, 1597
- Coloring possession; in *res geste* doc-
trine, 312, 1597
- Commerce, facts of, judicially noticed,
2135
- Commercial Agency, communication
to, not privileged, 1762
- Commercial Lists used in evidence,
1180
- Commission, mode of taking testimony
on; *see* Deposition
former testimony before, whether ad-
missible, 914
certificate of; *see* Certificate
- Commitment to an insane asylum; *see*
Sanity
- Common Carrier, loss by, presumed
negligent, 2061
- bill of lading by, burden of proof
for, 2093
- Common Law, trials at, in Federal
Courts, 23
see also Chancery
- Common Offender, other acts to evi-
dence character, 232
prior conviction, to increase sen-
tence, 222
provable by reputation, 1078
- Communications, privilege for; *see*
Privilege, II
- exciting insane belief, disproof of,
258
- Comparison of Hands; *see* Handwrit-
ing
- Competence, of evidence; *see* Admis-
sibility
- of employee; *see* Employee
- of physician; *see* Physician
- of persons in general; *see* Skill;
Negligence
- of witnesses in general; *see* Witness,
I, Qualifications
- Complainant, uncorroborated in rape,

INDEX OF TOPICS

[Numbers refer to sections §§]

Complainant — Continued
 bastardy, breach of promise, etc., 1520
 in rape, too young to be a witness, 625, 1237

Complaint, of rape; see Rape
 admissions in pleading, 680
 failure to make, as an admission, 657
 of bailee, after robbery, 627
 of owner, after larceny, 627, 1238
 mother's, in travail, 626

Completeness, verbal, 1547
 of dying declarations, 962, 1553
 oral utterances, 1549
 documents, 1562
see also Whole of an Utterance; Document

Compromise, offer to, as an admission, 641

Compulsory Process
to obtain witnesses
 constitutional guaranty, 1670
 use against Executive, 1850
 exemptions from; *see* Privilege
to compel answers; see Privilege
to compel bodily exposure, 1662, 1701, 1704, 1739
 confession obtained by; *see* Confession
 Compurgation; *see* Wager of Law

Concealment, as evidence of guilt, 652
 of a document, 662, 763, 764

Conclusiveness, of official certificates or records, 896, 904
 of magistrate's report of testimony, 900
 of enrolled statute, 903
 of certificate of election, 904
 constitutionality of statutes declaring, 906
 of judicial notice, 2120
 of judicial admission, 635, 2140
 of ordinary admission, 635, 2140
 distinguished from parol evidence rule, 1946

Condition of a human being as to health, etc.; see Health; Sanity
 prior dangerous, to evidence notice, 284
 subsequent repaired, to evidence negligence, 649
 of a highway, machine, place, weapon, etc., as evidenced by effects, etc., 340-356
 in one place as evidence of, in another, 342

Condition Precedent, shown by parol evidence, 1888, 1893, 1908
 burden of proof of performance of, 2093

Conditional admissibility, 45, 121, 300, 1360

Conduct, as evidence, 215
 to show character in issue, 155-161, 231
 unfair surprise in showing, 218, 231, 1326

Conduct — Continued
 to evidence capacity, 241
 as evidence of insanity, 256
 cannot amount to an admission, 292
 when under arrest, as evidence of guilt, 650, 668, 670
 as evidence of innocence, 294, 665
 to prove arson, 329
 as measure of time, space, light, sound, etc., 354
 of others, as measure of negligence, care, cruelty, danger, insufficiency, unreasonableness, unskilfulness, horses' fright, passengers' behavior, safeguards for railroads, malpractice, 355
 reasonableness of, for jury, 2107
see also Character; Consciousness of Guilt, of Innocence; Intent; Design; Identity; Knowledge; Sanity; Marriage; Demeanor; Flight; Defendant; Carefulness

Confession of falsehood disqualifying attester, 377

Confession of Crime
 distinguished from hearsay, 514, 632, 971
 what is a confession, 701
 distinguished from denials, guilty conduct, and self-contradictions, 701
 principles of exclusion, 700-705
 intoxication does not necessarily exclude, 715
 inducement in obtaining, 702, 705, 708, 721, 853
 voluntariness of, 705, 716
 person in authority, 706
 to clergymen, not excluded, 713
 obtained on advice to "tell the truth," 707
 in "sweat box" of police, 708
 by threat of corporal violence, 708
 by promise of pardon, 709
 of reward of money, 710
 of better treatment, 710
 of withholding legal action, 710
 by assurances, 711, 712
 by religious or moral influence, 713
 by trick or fraud, 714
 under arrest, or on examination by magistrate, 716-720
 before coroner, 720
 time of beginning and ending of the inducement, 721
 confirmation by subsequent facts, 722
 corroborated by finding stolen goods, 722
 facts disclosed by, admissible, 722
 burden of proof, 723
 judge and jury, 724-728
 right to cross-examine to admissibility of, 724

INDEX OF TOPICS

[Numbers refer to sections §§]

Confession — *Continued*

admissibility of, determined by evidence, 724
 voluntariness of, a question for court, 724
 of perjury, as impeaching a witness, 541
 of principal or co-conspirator, 687
 report of prior testimony used as, 890
 of crime by a third person, as hearsay, 971
 whether alone sufficient to convict respondent in divorce, 1529
 accused in general, 1530
 bigamy, etc., 1542
 mentioning another crime, 1577
 whole must be proved, 1549, 1577
 may be proved, 1576, 1580
 to a priest, privilege for, 1870
 Confidential Communication, confession not privileged as, 714
 privileged kinds; *see* Privilege
 Confidential Relations of grantee, presuming fraud from, 2047
 Conflict of Laws, rule of evidence applicable, in general, 17
 between Federal and State laws of evidence, 21
 Conflict of Presumptions, 2014
 Confrontation, right of; *see* Hearsay Rule, I
 Confusion of Issues, by showing particular acts of bad character, 218
 general theory of, 1383
 as applied to conduct to show character in issue, 231
 in evidencing tendency, capacity or quality, 349
 in admitting collateral facts to impeach witness, 567, 571
 in showing self-contradiction, 574
 may exclude experiment as real evidence, 730
 in circumstantial evidence, 1383
 Congress, privilege of member of, 1842
see also Legislature
 Consciousness of Guilt, as evidence, general theory, 211
 conduct, as evidence of, 290
see also Knowledge
 Consciousness of Innocence, as evidence, 211, 294
 Consent, presumption of, to marriage, 2055
see also Contract; Bill of Lading; Age of Consent
 Consideration, words as *res gesta*, to show, 1246
 recital of, varied by parol, 1929
 presumption of, 2069
 Consistent statements by a witness; *see* Witness, III
 Conspirator; *see* Co-conspirator
 Constitutional Rules, in general, 31

Constitutional Rules — *Continued*

affecting legislative power to alter the law of evidence, 31
 forbidding *ex post facto* laws, 31
 requiring formalities for enacting bill, 903
 whether testimony may be decisive, conclusive, 906
 sanctioning right of confrontation, 929
 use of certificate of marriage, 929
 right of confrontation consistent with use of depositions, declarations, former testimony, official statements, reputation, respecting right of confrontation may be waived, 929
 requiring full faith and credit State records, 1160
 for compulsory process, 1670
 effect of waiver by judicial admission, 2144
 Construction
 of other machines, buildings, etc., as evidence of danger, etc., 330, 355
 of a document; *see* Parol Evidence Rule, D
 Consul, privilege of, 1689
 certificate of, 1145
 Contempt, for not obeying compulsory process
 power of officer summoning, 1671
 excuse of witness, 1685
 refusal to disclose irrelevant matter, 1694
 exemption of Executive from process, 1850
 proof beyond a reasonable doubt, 2027
 Contents, of a document; *see* Will Document
 Continuity, presumption of, 2083
 presumption of, is founded on inference, 340
 of ownership, possession, authority, insanity, residence, 2083
 of physical or external condition, 250, 340
 Contract, course of business as evidence of, 171, 320
 intention as evidence of, 184
 belief as evidence of, 293
 other transactions, as evidence of terms of, 317, 319
 value of goods or services, as evidence of price agreed in, 326
 utterances of, as *res gesta*, 1242
 opinion of damages by breach of, 1435
 meaning of, by opinion evidence, 1459
 understanding of the parties, 1459
 putting in the whole, 1553, 1566, 1576

INDEX OF TOPICS

[Numbers refer to sections §§]

Contract — *Continued*

- discharge by parol, 1938, 1950
- alteration by parol, 1938
- bogus or sham, 1878
- subsequent agreement not to sue, 1931, 1934a
- condition precedent, shown by parol, 1888, 1893, 1908
- reformation of, in equity, 1906
- completeness of, in ticket, 1927
- of warranty, shown by parol, 1930
- agreement in, not to be used as binding, 1931
- transactions of friendship in, 1931
- burden of proof in, 2093
- jury or judge to interpret, 2110
- calling the attesting witness; *see* Attesting Witness
- production of original; *see* Original Document
- interpretation of; *see* Parol Evidence Rule, D
- with deceased party; *see* Deceased Person

Contradiction of a witness, to impeach him

- one's own witness, 508
 - general theory, 567
 - collateral facts excluded, 567
 - test of collateralness, 568
 - material facts, 569
 - facts of bias, 570
 - corruption, 570
 - intoxication, 570
 - moral character, 570
 - skill, 570
 - illness, 570
 - opportunity to observe, 570
 - recollection, 570
 - narration, 570
 - particular acts of misconduct, 570
 - cross-examination, 572
 - supporting the witness, 571
 - answers in, on direct examination, 571
 - of an explanatory statement, 538
 - falsus in uno*, as a rule for rejecting testimony, 573
- ### Contributory Negligence, not presumed, 2060, 2063
- see also* Negligence
- ### Conversation, by an interpreter, testimony to, 1280
- by telephone, testimony to, 412, 1594
 - meaning of, proved by opinion evidence, 1459
 - whole must be proved, 1549, 1553
 - may be proved, 1576, 1580
- ### Conversion; *see* Trover
- words accompanying the taking, as *res gesta*, 1246
- ### Conveyance, of property, as evidence of a weak case, 647
- relationship as bearing on good faith in, 325

Conveyance — *Continued*

- privilege for advice in drafting, 1770
 - record of; *see* Recorded Conveyance.
- ### Conviction of Crime
1. *Disqualification by*, 375
 - kind of crime, 375
 2. *Impeachment by*
 - general principle, 552, 555
 - asking on cross-examination, 555, 828
 - producing a record-copy, 828
 - proving by cross-examination without copy, 828
 - whole of the testimony, 1570
 - restoring credit after, 598, 608, 609
 - identifying by name, 2082
 3. *Sundries*
 - imprisonment of attesting witness, 876
 - infamy of an attesting witness, 877
 - of witness, excusing absence of a deponent, 938
 - of principal, used against accessory, 687
 - of third person, to exonerate accused, 194
 - of accused, to increase sentence, 222
- ### Copy of a Document
1. *When must the original be produced; see* Original Document
 2. *Rules for proof of copy, when original's non-production is excused*
 - as distinguished from recollection, 820
 - copy preferred to recollection of contents, 822-829
 - party's admission, 807
 - witness' admission, 812
 - public record, 827
 - record of conviction, 828
 - foreign statute, 829
 - duplicate, distinguished from copy, 783
 - carbon, as original, 784
 - examined and sworn copies, 831
 - certified copies, 831
 - copy preferred to abstract, 831
 - newspaper files, 784
 - copy of a copy, 832
 - personal knowledge of correctness, 823
 - cross-reading, 823
 - press-copies, etc., 823, 1485
 - photographic copies, 484, 1485
 3. *Official or certified copy*
 - when admissible; *see* Certified Copy
 - not preferred to sworn copy, 831
 4. *Sundries*
 - copy in general, 489

INDEX OF TOPICS

[Numbers refer to sections §§]

Copy — *Continued*
 distinction between different kinds of copies, 1116
 copy of printed matter, as a sample to identify, 342
 of paper, used to aid recollection, 436, 447
 preference for maker of copy to recollection-witness, 897
 of lost document judicially established, 901
 of lost ancient deed, 1614
 of printed decisions and statutes, 1164, 1622
 proving the whole of the original
 lost documents, 1566
 public records, 1568, 1569
 judicial records, 1570
 furnished on demand before trial; *see* Discovery
 authentication by seal or signature, 1633
 Copyright, summary of contents, to prove infringement, 782
 Coroner, confession made on examination before, 718
 report of former examination of witness before
 whether preferred, 890, 892, 902
 whether admissible, 1137
 former testimony before, without cross-examination, 914
 inquest of death, as evidence, 1141
 testifying before, as a waiver of privilege, 1751
 Corporal Injury, repairs of premises after, as evidence of negligence, 649
 appearance of a wound, as indicating distance of assailant, 352
 speculative testimony to, 404
 physician's testimony as to possible developments in, 404
 qualifications of witness to, 409
 insurance as discrediting defendant-witness in, 548
 exhibition to the jury, whether allowable, 731
 whether compellable, 1662, 1704, 1739
 expressions of pain caused by, 1201
res gesta statements after, 1230
 inspection of, before trial, 1339, 1343
 privilege against inspection of, 1662, 1704, 1739
 opinion of damages by, 1435
 opinion testimony to, 1462
 inspection of, compellable, 1662, 1704, 1739
 privilege for communications to physician, 1855
 presumption of negligence from, 2060-2063

Corporal Injury — *Continued*
see also Negligence; *Infam.*
 Damages
 Corporation, disqualification of opponent as witness to a transaction with a deceased officer of, 391
 books and records of, as admissions, 674, 676, 686
 as official records, 1121
 as regular entries, 1021, 1022
 original books not produced, 784
 conclusive proof of proceedings, 901, 1945
 inspection before trial, 1335
 copy of whole required, 1569, 1578
 proved by certified copy, 1163, 1187
 certificate or charter of incorporation, proved by certified copy, 1152
 records of, proved by certified copy, 1163
 existence of, proved by reputation, 1087
 seal, presumed genuine, 1643
 privilege against self-crimination, 1735
 officer liable to subpoena *dūces tecum*, 1663
 discovery from, 1702
 immunity from disclosure; *see* Immunity
 incriminated by facts obtained from third person, 1754
 negotiable instrument signed by officer of, 1934a
 acts of, under parol evidence rule, 1945
 Corpus Delicti, as negated by survival of the alleged deceased, 192
 proof required, to corroborate confession, 1530
 definition of, 1531
 order and sufficiency of evidence of, 1532
 proved by circumstantial evidence, 1536
 Correspondence, acquaintance with, as qualifying a witness to handwriting, 420
 putting in the whole, 1565, 1582
 reply-letter presumed genuine, 1635
 Corroboration, what is, 1520
 Corroboration of a Witness
 1. *Modes of supporting an Impeached Witness*; *see* Witness, IV, *Restoring Credit*
 2. *Kinds of witnesses required to be Corroborated though unimpeached*
 treason, 1503
 perjury, 1504
 sundry crimes, 1506
 divorce, 1526
 chancery, 1507
 wills, 1509

INDEX OF TOPICS

[Numbers refer to sections §§]

Corroboration — *Continued*

sundry civil cases, 1514
 accomplice, 1517
 complainant in rape, bastardy,
 seduction, enticement, breach
 of marriage promise, 1520
 parent bastardizing issue, 398,
 1521
 surviving claimant, 1522
 children, 1523
 Chinese, 1523
 detectives, 1523
 prostitutes, etc., 1523
 confessions
 divorce respondent, 1529
 accused, 1530

3. *Sundries*

confession, corroborated by sub-
 sequent facts, 722
 utterances identifying a time or
 place, 336

Corruption of a witness, as impeaching him, 541

of one's own witness, 506
 willingness or offer to testify falsely,
 541
 confession of false testimony, 541
 attempt at subornation, 542
 receipt of money, 543
 sundry corrupt conduct, 544
 preliminary inquiry to witness, 545
 contradiction by other witnesses, 570,
 577

Counsel, comment of, on failure to produce evidence, 658-662

cross-examination by more than one,
 473
 statements by, as admissions, 680,
 683
 notes of testimony taken by, 1139
 reading scientific books to jury, 1177
 stating facts in argument, 1272
 improper statements by, in argu-
 ment, 1273
 in offering evidence or question-
 ing witness, 1277
 using emotional language to excite
 prejudices of jury, 1273
 illustrating argument by referring to
 literature, 1273
 taking the stand as witness, 1406
 claiming privilege for witness, 1743
 authority to make judicial admissions,
 2148

see also Attorney and Client;
 Attorney

Counter-claim, agreement of, shown by parol, 1932

Counterfeiting, possession of materials,
 as evidence of, 200, 267
 other crimes, as evidence of intent,
 302

Counterpart, as equivalent to original, 784

County ordinance, boundary, etc.,
 judicial notice of, 2132

Course of business, as evidence of an
 act done, 170

Court, record of; *see* Judicial Record
 adjournment of, as affecting pub-
 licity, 1312

exclusion of witnesses from, 1312

seal of, presumed genuine, 1639

officers and rules of, judicially no-
 ticed, 2133, 2134

see also View; Trial; Judge

Coverture, presumption of coercion
 during, 2065

as evidence of prior or subsequent
 condition, 320

see also Marriage

Credibility of a witness; *see* Impeach-
 ment; Weight; Witness, IV, *Re-
 storing Credit*

Credit, knowledge of falsity of repre-
 sentations as to, evidenced by re-
 pute, 285

of witness affected by his demeanor, 534
 restoring credit of accomplice, 617

of biased witness, 617

of impeached witness, 598, 608,
 609, 614

utterances showing to whom, was
 given, 1246

Creditor, of partnership, repute as evi-
 dence of knowledge of, 287

of an insolvent; transfers as evidence
 of intent to defraud, 306

debtor's admissions used against,
 688, 692, 697

indorsement of payment by, as state-
 ment against interest, 970, 975

utterances showing to whom credit
 was given, 1246

possessor's utterances, used against,
 1249

presumptions applicable to sale in
 fraud of, 2048

Crime, by a third person, as exonerat-
 ing an accused, 151, 194, 1208

evidence admissible, though it in-
 volves, 220

threats to commit a, 178

other crimes, as evidence of intent,
 knowledge, or design, 297-314

constitutionality of statute defining,
 906

privilege not to disclose; *see* Self-
 crimination

confession of, by a third person, 971

by foreign law not privileged, 1733

request to commit, not privileged,
 1860

presumption of capacity to commit,
 2065

marriage disqualifying spouse as wit-
 ness; *see* Marital Relationship

see also Conviction of Crime;
 Criminal Trial; Intent; De-
 fendant

Criminal Conversation, character of
 plaintiff as mitigating damages,
 156

INDEX OF TOPICS

[Numbers refer to sections §§]

Criminal Conversation — *Continued*
 conduct of plaintiff as mitigating damages, 239
 character of both husband and wife in issue in, 239
 conduct of defendant at other times, to show motive, 330
 expressions of husband or wife showing feelings, 1212
 eye-witness of marriage required, 1537
 marriage celebrant's certificate not preferred to eye-witness, 1543
 marital privilege in, 1723, 1817
Criminal Intent; *see* Intent
Criminal Trial, rules of evidence in, the same as in civil trial, 8
 in Federal courts, rules applicable in, 21
 injured person's admissions in, 686
 exhibition of weapons or wounds to jury, 731
 notice to produce original in, 768
 right of confrontation in, 929
 list of witnesses to the accused in, 1327
 eye-witnesses of crime required, 1534
 eye-witness to marriage in, 1542
 marriage celebrant's certificate not preferred to eye-witness, 1543
 proof of *corpus delicti*, 1530, 1536
 tender of witness' expenses in, 1680
 marital privilege in, 1723
 patient's privilege in, 1860
 proof beyond a reasonable doubt in, 2023
 inference from failure to produce evidence in, 1748
 burden of proof in general, 2064
see also Defendant; Character;
 Crime
Cross-examination
 I. *Right to a Cross-examination*
 II. *Mode of Interrogation*
 III. *Order of Topics and Witnesses (Cross and Direct)*
 IV. *Methods of Using for Impeachment*
 V. *Sundries*
 I. *Right to a Cross-examination*
 theory and art of, 910, 911, 913
 opportunity for, equivalent to actual, 917
 tribunal not employing, bars admissibility elsewhere, 914
 constitutional guarantee of, 929
 issues and parties affecting opportunity of, 919
 exclusion of testimony or deposition not subjected to cross-examination; *see* Hearsay Rule, I
 admission of testimony or deposition of absent person already cross-examined; *see* Hearsay Rule, I

Cross-examination — *Continued*
 exceptional admission of hearsay statements made out of court; *see* Hearsay Rule, III
 testimony excluded for insufficiency of, 922-927
 adequacy of, in foreign language, 927
 failure of, through witness' death or illness, 922
 through refusal to answer, 924
 testimony excluded for non-responsive answers, 925
 right to cross-examine to admissibility of a confession, 724
 showing document to opponent before, 1345
 what witnesses may be subjected to
 witness sworn by mistake, 1378
 called but not sworn, 1378
 sworn but not questioned, 1378
 producing or proving a document, 1378
 one's own witness, 512
 party opponent treated as if on, 1372
 of a deposition, excluded
 if direct answers are excluded, 1378, 1559
 or not offered, 1378, 1559
 of non-taker using the whole, 1378, 1559
 II. *Mode of Interrogation*
 theory and art of, 913
 specifying grounds of recollection on, 429
 use of a memorandum of recollection on, 440, 449, 451
 use of a deposition to refresh recollection, 448
 leading questions on, 464, 512
 misleading questions on, 467
 derogatory and untrue insinuations in questions on, 467
 intimidation by cross-examiner, 455, 468
 intimidating and annoying questions on, 468
 repetition of questions on, 469
 multiple cross-examiners, 473
 length of, 473
 non-responsive answers on, 475
 improper offer of evidence on, 1277
see also Question to a Witness
 III. *Order of Topics and Witnesses (Cross and Direct)*
 order and time of examination, 1353
 postponement and waiver, 1372

INDEX OF TOPICS

[Numbers refer to sections §§]

Cross-examination — *Continued*
 offering documents, 1372
 putting in one's own case, 1376
 who may be cross-examined; *see supra*, I
 stating the purpose of a question on, 1360
 re-cross-examination, 1380
 recall for re-cross-examination, 1381

see also Examination

IV. *Methods of Using for Impeachment*

to impeach rape-complainant as to chastity, 229

to impeach a witness

general theory, 500

one's own witness, 512

broadness of scope, 533

bias or quarrels, 538

conviction of crime, 555, 828

may ask about previous convictions, but not prosecutions, 552

other misconduct, 553, 556

rumors of misconduct, 557

testing a witness' grounds of knowledge, 561-564

testing a witness' recollection, 561-564

manner of questioning, 467, 468

leading questions, 464

repetition of questions, 469

collateral facts, 572

self-contradictions, 578

by preliminary warning, 579

expert witness, in general, 560

to value, 357

to handwriting, 1487

to scientific books, 1177

restoring credit after, 598, 609, 614

see also Witness IV, Restoring Credit

privilege not to criminate, 1740, 1752

to impeach a party as witness

accused, 1752

civil opponent, 513

by account-books, 1029

V. *Sundries*

to contents of a document, 807, 812

prior deposition, 812

showing document to opponent

before, 1345

witness on, 421, 751

to testimony before a committing

magistrate, 914

preliminary warning to guard

against unfair surprise, 579

Crossing of railway; *see* Highway;

Negligence; Repairs

Cross-reading of a document, copied,

823

Cruelty, other persons' conduct, as a standard of, 355

by husband to wife; *see* Homicide

Cumulative witnesses excluded, 1401

Curative admissibility, 46

Custodian's certified copy; *see* Certified Copy

Custom, as evidence of doing an act, 170

other instances, as evidence of tenor, 316, 319

evidence of land rights founded on, 319

in other factories, etc., as evidence of safety, etc., 355

witness' experience in, 383

concerning land-rights; *see* Reputation

proved by opinion, 1450

of a trade or locality to vary terms

of written contract, 1937

judicially noticed, 2135

see also Habit; Usage

Customers, names of, as privileged, 1696

D

Damages, character of plaintiff in mitigation of, 156

conduct, to prove character in mitigation of, 239

opinion testimony to, 1435

impeaching a verdict determined by average, 1947

amount of, as evidenced by other transactions; *see* Contracts; Value

other defamatory utterances, to increase; *see* Defamation

Danger, of machine or place, evidence of owner's knowledge of, 284

construction of other machines, buildings, etc., as evidence of, 340, 350, 355

other instances of injury, etc., as evidence of, 350

opinion as to, 1445

risk of fire; *see* Insurance

Date; *see* Time

Daybook of regular entries, 1023, 1032

Deadly Weapon, knowledge principle as applied to use of, 312

malice presumed from use of, 2064

Deaf-mute may be a witness, 367

interpreter's qualifications, 387

necessity of interpreter, 496

impeachment of, 526

Death, as evidenced by lack of news, 205

of opponent, not necessary for using admissions, 632

of attesting witness, 870

of declarant of facts against interest, 967

of pedigree-declarant, 981

INDEX OF TOPICS

[Numbers refer to sections §§]

Death — *Continued*

of maker of regular entries, 1003
statement of time or place of; *see*
Family History
reputation of, 1069
register of; *see* Register of Mar-
riage, Birth, and Death
as excusing lack of cross-examina-
tion, 922
as allowing use of deposition, 931
provable by coroner's inquisition,
1141
as affecting marital privilege, 1712,
1724
patient's privilege, 1863, 1867
client's privilege, 1807
presumed, to validate a later mar-
riage, 2059
negligence presumed from, 2063
absence raises presumption of, 2084
De bene esse; *see* Deposition
Debt, prior indebtedness, as evidence,
320
pecuniary relations to show bias of
a witness, 536
as evidence of motive, 326
see also Payment; Contract;
Creditor
Debtor, indorsement of payment by, as
statement against interest, 970, 975
admissions of, used against creditor,
688, 692, 697
declarations of, to show motive in
conveyance, 694, 697
utterances in possession, used against
creditor, 1249
see also Creditor
Deceased Declarant; *see* Dying Dec-
laration
Deceased by Homicide, character of, to
evidence self-defence, 141, 278
threats of, to evidence self-defence,
182, 658
suicidal plans of, to evidence an ac-
cused's innocence, 195, 1208, 1209
acts of violence by, to evidence self-
defence, 225, 280
details of prior quarrels to show hos-
tility by, 329
Deceased Person,
disqualification of surviving opponent
as witness, 391, 1045, 1522
admissions of, 688
oral, not sufficient to establish
claim against estate of, 1514
character of, to prove negligence, 148
use of account-books for or against,
1029
hearsay statements of, admissible,
dying declaration; *see* Dying
Declaration
facts against interest; *see* Against
Interest
pedigree; *see* Family History
attesting witness; *see* Attesting
Witness

Deceased Person — *Continued*

regular entries; *see* Regular En-
tries
private boundaries; *see* Bound-
aries
ancient deed-recitals; *see* Recit-
als
deceased persons in general, 1045
statutory exception for all statements
of, 1045
see also Death; Survivor
Deceased Witness, former testi-
mony of; *see* Former Testimony
Decision; *see* Judicial Decision
Declarant, of facts against interest, ab-
sence of, 967
absence of pedigree, 981
Declaration, of intent, used to interpret
a document, 1976
after possession ended, as admissible,
1247
during possession, as verbal act,
1246, 1248
of deceased person; *see* Deceased
Person
Dedication, words accompanying, as
res gesta, 1246
opinion evidence of intent of, 1458
Dedimus Potestatem; *see* Deposition
Deed, execution or delivery of, as evi-
denced by possession of it, 203
mode of proving forgery of; *see*
Forgery
impeaching one's own, 377
possession under, as evidence of
boundaries, 318
original must be produced; *see* Orig-
inal Document
calling the attesting witness; *see* At-
testing Witness
recitals in, as admissible; *see* Re-
citals
land-grant of government, 781, 791
certificate of acknowledgment of,
whether conclusive, 901, 905
registration of, whether conclusive,
905
contents of lost deed, recited in as-
other, 1040
as showing reputation of boundary,
1060
admission of execution of recorded,
1112
execution of, proved by certificate of
acknowledgment, 1147
abstract of title, as hearsay, 1183
words accompanying gift by, 1246
location of description in, by opin-
ion, 1458
substance of contents of lost, 1453,
1566
dispensing with proofs of prior, 1597
see also Common Source of
Title
thirty years old, presumed genuine,
1604-1618
proof of agent's authority to execute

INDEX OF TOPICS

[Numbers refer to sections §§]

Deed — *Continued*

- ancient, 1617
- filed in official records, presumed genuine, 1630
- privilege for title-deeds, 1695
- recital of consideration in, varied by parol, 1929
- condition precedent, shown by parol, 1888, 1908
- recording not necessarily final act of, 1888
- absolute in form, shown by parol to be security only, 1933
- collateral agreements to a, 1935
 see also Collateral Agreements
- interpretation of, 1953
- erroneous description in a, 1983
- burden of proof of capacity of grantor, 2041
 presumption from confidential relations, 2047
- presumption of delivery, date, seal, etc., 2069
 of lost grant, 2069
 of alteration before execution, 2069
 of identity of grantor or grantee, 2080
 see also Document; Execution; Handwriting; Recorded Conveyance; Abstract of Title-deeds; Color of Title
- De facto officer, document made by, 1092
- celebrant of marriage, 2059
- appointment presumed, 2089

Defamation

- character of plaintiff, to evidence innocence, 149
 to mitigate damages, 155
- mitigation of damages in, as affected by the pleadings, 155
- general character or particular traits in mitigation of damages in, 155
- reputation founded on rumor as mitigating damages in, 155
- conduct of plaintiff as affecting defendant's ground for suspecting in, 155
- good character as affecting damages in, 158
- acts of plaintiff, to justify or to mitigate damages, 236, 239
- unfair surprise in justifying acts in, 236
- other acts, to evidence intent, 314
- other utterances, to evidence malice, 331
- other persons' libels, as a standard of criticism, 355
- meaning of, by opinion evidence, 1459
- whole of an utterance to be proved, 1549, 1576, 1580
- proof of charge beyond reasonable doubt, 2027

Defamation — *Continued*

- testimony before grand jury, not privileged, 1836
- official reports, privileged, 1842
- Defect, presumption of, from accident, 1517
 see also Negligence
- Defendant
 character of accused, as evidence, 131-137
 time of character, 135
 kind of character, 137
 accused as witness, 223
 character of a civil defendant, 142-150
 threats of accused, to prove crime, 178
 mode of evidencing character by conduct
 of accused, 219-223
 of civil party negligent, 228
 of deceased in homicide, 225
 of character in issue, 231
 of character to mitigate damages, 239
 mode of evidencing skill or strength, 241, 242
 sanity, 252, 256, 261
 knowledge or belief; *see* Knowledge
 consciousness of guilt; *see* Consciousness of Guilt
 accused qualified as witness, 389
 co-defendants as witnesses, 389
 wife of, as witness, 396
 testifying to his own intent, 392
 confessions of; *see* Confessions
 admissions of; *see* Admissions
 impeachable like other witnesses, when called for himself, 502
 when called for the opponent, 513
 may impeach a co-defendant, 514
 admissions of a co-defendant, 686
 statements when found with stolen goods, 1246, 1250
 silence of, as an admission, 666, 668
 prejudice to, by exhibition of wounds, etc., 731
 consistent statements of, in vindication, 628
 magistrate's report of examination of, 890, 902
 expressions of intent or motive, 1213
 right to be present at a view, 1269
 opinion testimony to capacity of, 1454
 confession of accused, sufficiency of, 1530
 examination of accused before magistrate; *see* Deposition; Former Testimony
 privilege against self-crimination, 1751
 see also Co-indictee
- Definition, of evidence, 1

INDEX OF TOPICS

[Numbers refer to sections §§]

Definition — Continued
 of Preferential rules, 745
 of Analytic rules, 745
 of Prophylactic rules, 745
 of Simplificative rules, 745
 of Quantitative rules, 745
Degree of probative value required for relevancy, 118
 of evidence; *see* Best Evidence; Copy
Delay, in complaining or suing, as evidence, 657
Delivery by mail, express, or telegraph, 172
 of a deed, as evidenced by possession of it, 203
 words accompanying, of a chattel, 1246
 of a document, proved without production, 800
 of negotiable instrument in escrow, 1892, 1908
 of a deed, shown conditional by parol evidence, 1892, 1908
 grantee's possession as evidence of, 2069
 date of, presumed from date of document, 2069
 registration as evidence of, 2069
see also Parol Evidence Rule; Deed
Delusion, as affecting competency, 117, 256
Demand for a document; see Notice to Produce
Demeanor, of accused, as evidence of guilt, 650
 under the right of confrontation, 928, 929
Demurrer to evidence, 2006, 2140
 of a witness, as affecting credibility, 534
 to claim barred by statute of limitations, 2094
Dentist, privileged communication to, 1857
Deponent, absence of, 932
Deposition
 I. *Right of Cross-examination of Deponent*
 personal attendance must be shown impracticable, 914
 notice required, 916
 plural depositions, 916
 in *perpetuam memoriam*, is notice required, 916
 attendance cures defective notice, 916
 issues and parties the same, 919
 either party may use, 921
 opponent using suppressed deposition, 921
 non-responsive answers, 925
 sweeping interrogatories, 925
 II. *Right of Confrontation of Deponent*
 constitutional guarantee, 929

Deposition — Continued
 excuses for non-attendance (illness, non-residence, imprisonment, etc.), 930-938
 proof of the excuse, 940
 witness present in court, 941
 not usable if witness available, except to impeach, 942
 opponent's deposition, 942
 deposition used to impeach deponent, 942
 malicious prosecution, 942
 chancery depositions, 945
 probate and bastardy examinations, 945
 chancery and *dedimus potestatem*, 916, 945
perpetuam memoriam, 916, 930, 945
 III. *Sundries*
 (a) *taking*
 mode of taking, 914, 916
 objection to, time of making, 365
 must be taken by one authorized, 914
 mode of interrogation in; Question to a Witness
 prepared beforehand to suggest answers, 493
 officer taking, not to be party's agent or kinsman, 491
 taking an attesting witness' deposition, 872
 power of officer to compel answer, 1660
 persons privileged to testify by, 1686, 1690
 attendance from a distance not required, 1692
 (b) *transcribing*
 transcription of answers to be literal and immediate, 492
 reading over and signing, 494
 (c) *use by proponent*
 used to refresh the recollection of one's own witness, 507
 used to aid recollection, 448, 451
 (d) *use by opponent*
 used by opponent, as preventing impeachment, 510, 511
 impeachment by self-contradiction, 582
 in another trial, used or referred to, 677
 cross-examination on a prior deposition, 812
 (e) *miscellaneous*
 in general, 490
 magistrate's report of examination preferred, 890, 902
 perjury in, inadmissible, 902
 written deposition required to be used, 894
 of ambassador, 918, 936
 statement in, to evidence pedigree, 992

INDEX OF TOPICS

[Numbers refer to sections §§]

Deposition — *Continued*

certificate of taking of, 1147
 certified copy of; *see* Certified Copy
 liability of deponent for perjury, 1311
 cross-answers excluded, 1378
 non-taker using may not impeach, 1378
 putting in the whole, 1563, 1571, 1576
 documents referred to in, 1565
 annexing a copy of a document to, 421, 751
 under Federal statute; conflicting laws, 23
see also Discovery; Examination
 Deputy Officer, document made by, 1092
 Description, in deed, interpretation of; *see* Parol Evidence Rule, D
 location of, in deeds, maps, etc., 1452
 Design, as evidence of an act done, 177
 definition of, 297
 conduct, preparation, etc., as evidence of, 266
 other crimes, as evidence of, 297-314
 statements of, 1208, 1219
 Destruction of evidence, as indicating guilt, 654
 of document, as evidence of contents, 662
 as excusing production, 759
 of other property, as evidence of a nuisance, 350
 Detective, impeached by his interest or bias, 536, 548
 testimony of, to be corroborated, 1523
 confession made to; *see* Confession
 De ventre inspiciendo, writ of, 1704
 Devisee, admissions of, 688
see also Will; Executor
 Diagram, as a mode of testifying, 480
 verification of, 481
 Dictionaries, used in evidence, 1175
 judicially noticed, 2135
 Difficulty, of work, etc., as shown by instances, 354
 Diligence in search for lost document, 760
 in search for attesting witness, 873
 Diplomatic Officer; *see* Ambassador; Consul
 Direct Evidence, defined, 109
 Direct Examination
 specifying grounds of knowledge on, 402
 specifying grounds of recollection on, 429
 leading questions on; *see* Question
 contradicting answers made on, 571
 struck out, if cross-examination is not had, 922

Direct Examination — *Continued*

order of topics on, 1372
 putting in documents on, 1372
 party opponent on, treated as if on cross-examination, 1372
 irrelevant matters, conditionally received on, 1360
 what constitutes calling a witness on, 1378
 cross-examination to facts asked for on, 1376
see also Examination; Cross-examination
 Directing a verdict, 2006
 Disbarment, proof beyond reasonable doubt, 2027
 Discharge of contract, shown by parol, 1938, 1950
 charge and discharge entries, 1579
 Discovery
 general principle as to discovery, 1325, 1335
 exceptions to the rule
 list of witnesses in criminal cases, 1327
 discovery in chancery, 1332, 1335
 statutory interrogatories to opponent, 1332
 names of witnesses in civil cases, 1341
 documents inspected before trial, 1335
 against third person not a party, 1341, 1342
 of sundry documents, 1335
 shown on cross-examination, 1345
 inspection makes evidence, 1345
 exclusion for failure to allow inspection, 773
 premises, chattels, and body, inspected before trial, 1339, 1343
 from opponent in chancery at the trial, 1702
 under client's privilege, 1797
 see also Chancery
 Discretion of the trial court; *see* Judicial Discretion
 Disease, specific tendency of, shown by symptoms, 352
 subsequent, to evidence prior act, 206
see also Illness
 Disgracing Answers, privilege against, 1701
 Disinheritance, as evidence of testator's insanity, 255
 parol evidence of intent, 1982
 Disorderly house; *see* House of Ill-fame
 Disqualification, by reason of interest, 388
 mode of ascertaining, 393
 time of interest to cause, 393
 burden of proving, 393
 mode of proving, 393
 time of objecting to, 393
 judge determines, 2101

INDEX OF TOPICS

[Numbers refer to sections §§]

Disqualification — *Continued*
of party charged in same indictment, 389
of survivor against deceased, 391
of declarant, under exceptions to Hearsay rule, 1233
by conviction of crime; *see* Conviction of Crime
Distance, of a weapon, as shown by effects, 352
of a person, sound, sight, etc., as shown by instances, 354
as excusing absence of an attesting witness, 872
of a deponent, 937
opinion testimony to, 1464
of witness' residence exempting from attendance, 1692
judicially noticed, 2135
Divorce, as qualifying wife as witness, 396
evidence of adultery of co-respondent in, 151
as affecting marital privilege, 1712, 1724
one witness to a charge, 1526
corroboration required of detective's and prostitute's testimony in, 1523
confession of respondent, 1529
eye-witness of marriage, 1537, 1542
marriage celebrant's certificate not preferred to eye-witness, 1543
inspection of party, on charge of impotency, 1704
presumed, to validate a later marriage, 2059
Docket, original's production required, 778
certified copy allowed, 1160
Document
possession of, as evidence of payment, 202
execution or delivery, as evidenced by possession of it, 203
possession of, as evidence of knowledge, 289
failure to produce, as evidence of contents, 662
concealment of, 662, 763
destruction of, as evidence of contents, 662
marks on, as evidence of identity, 338
impeaching one's own, 377
requirement of two impeaching witnesses in Pennsylvania, 1514
execution of, witness' personal observation of, 410
proof of genuineness by handwriting; *see* Handwriting
of predecessor, as qualifying a witness to handwriting, 420
third person, as party's admission, 671
used to aid recollection; *see* Recollection

Document — *Continued*
showing to opponent before cross-examination, 1345
to witness on cross-examination, 421, 751
right to require proponent to show to opponent, 1345
original must be produced; *see* Original Document
dying declaration reduced to writing, 957, 963
kinds of copy allowed or preferred; *see* Copy; Certified Copy
execution proved by attesting witness; *see* Attesting Witness
by other methods; *see* Execution
putting in on direct or cross-examination, 1372
impeachment of witness who proves, 1378
discovery of, before trial; *see* Discovery
taken to jury-room, 1268
expert testimony to, alterations, decipherment, erasures, - forgeries, imitations, ink, paper, spelling, 1491
putting in the whole
sundry instances, 1562, 1578
depositions, 1563, 1571, 1576
separate documents, 1565, 1582
lost deeds, etc.; abstracts, 1582
lost wills, 1566
public records, 1566
judicial records, 1570
bill and answer in chancery, 1571
account-books, 1581
chancery answer, responsive parts, 1584
presumed genuine in official files, 1630
answers to interrogatories, 1587
document inspected by opponent, 1589
authentication of, 1591
authenticated by circumstantial evidence, 1596
authentication unnecessary, 1597
put in by cross-examiner, 1604
self-criminating, illegally seized, 1656
obtained by illegal search, 1656
privilege for title-deeds, 1695
documents held under a lien, 1695
trade secrets, 1696
production by opponent at trial, 1703
by witness, 1662, 1663
by one who has control of, 1663
under self-crimination privilege, 1730
inference from withholding, 1730
under client's privilege, 1781, 1797
ambiguity in, 1978

INDEX OF TOPICS

[Numbers refer to sections §§]

Document — *Continued*
Parol evidence rule binds parties only, 1939
Burden of producing, under parol evidence rule, 1941
Parol evidence to vary terms; see Parol Evidence Rule
delivery of, having a blank, 1893, 1907
possession of, as presuming payment, 2068
spoliation of, as creating a presumption, 2069
presumption of alteration, 2069
admission of execution of, 1597
 consideration, 2069
 date, 2069
 delivery, 2069
 execution, 2069
 loss, 2069
 signature, 2069
liability on alteration of, 1907
interpretation of
 by expert testimony to technical words, 1451, 1452
 for the court, 2110
 by parol evidence; *see* Parol Evidence Rule, D
 see also Contract; Deed; Execution of Document; Judicial Record; Original Document; Public Document; Recorded Conveyance; Will
Dog, character of, as evidence, 152
 recognition by, 212
 conduct of, in tracing an accused, 212
 as evidencing disposition, 230
 see also Animal
Domain, inquisition of, 1130
Domicil, declarations of, by a voter, 1195
 by other persons, 1209, 1253
 presumed to continue, 2083
Doubt, proof beyond a reasonable, 2023
Dramatic expression by a witness, 479
 modes of testifying, 731
 see also Exhibition
Drawee, parol agreement collateral to instrument, 1934a
 see also Bill of Exchange
Drawing, used to illustrate testimony, 480
Drinking; see Intoxication; Intemperance; Liquor; Liquor-selling
Driving a vehicle; see Vehicle; Negligence
Drug, specific tendency of a, 352
 see also Poison; Pharmacist; Opium
Drunkenness; see Intoxication; Intemperance; Liquor; Liquor-selling
Duces tecum; see Subpoena
Duplicate original document, production of, 784
 distinguished from copy, 783

Duress making acts voidable, 1913
 see also Confession
Dying Declaration
 constitutionality of admitting, 929
 principle, 952
 restricted to certain criminal cases, 952
 of woman in abortion, 952
 death must be declarant's, 952
 subject of declaration, 953
 consciousness of speedy and certain death, 954
 subsequent confirmation of incompetent, 954
 certainty of death, not possible or probable death, 954
 actual period of survival immaterial, 954
 theological belief, 955
 manifested revengeful feelings in, 955
 recollection, leading questions, etc., 957
 declarant must be competent as witness, 957
 may be communicated in any manner, 957
 impeachment, 582, 960
 opinion rule, 961
 cut short by death or intruder, 962
 producing the whole, 962, 1553
 written statement not preferred, 951, 963
 written report of magistrate, 951
 reduced to writing, 951
 judge and jury, 964

E

Effect of a machine, place, weapon, experiment, etc., as evidencing the cause or origin, 340-355
Ejection; see Deed; Title; Possession; Common Source of Title
Election, offences against, other acts evidencing intent, 314
 certificate of, conclusive, 904
 books of, as evidence, 1101
 results of, judicially noticed, 2133
 see also Vote; Ballot
Electric Wires; see Negligence; Machine; Highway
Elevator, former instances of injury or negligence, 284
 defective; *see* Negligence; Owner; Machine
Embezzlement, possession of money, as evidence of, 201
 other embezzlements, as evidence of intent, 305
 motive for, 326
Embracery; see Bribery
Eminent Domain, view by jury in, 739
 see also Damages
Employee, character of, to evidence negligence, 148

INDEX OF TOPICS

[Numbers refer to sections §§]

Employee — *Continued*

character of, as affecting employer's liability, 161, 281
intemperance of, as constituting incompetence, 173, 238
acts of negligence, to evidence character, 228, 238
to evidence employer's knowledge, 282
unfair surprise in showing negligent acts of, 238
on vehicles, bridges, etc., standard of conduct of, 355
as a biased witness, 536, 548
appearance of, as indicating competence, 730
presumption of negligent injury to, 2062

Employer's Liability, character of employee as affecting, 161, 281

Engine; *see* Sparks; Machine; Speed
Enlistment, register of, as evidence, 1102

Enrolment, of a statute, whether conclusive, 903

of a deed; *see* Recorded Conveyance
of a judicial proceeding; *see* Judicial Record

Enticement for prostitution, character of complainant to show consent, 138
other offences as evidence of intent, 308

Entry, in a book, to aid recollection; *see* Recollection

made by a public officer; *see* Public Document

in docket or minutes; *see* Judicial Record

as a statement of facts against interest; *see* Against Interest
made in the course of business; *see* Regular Entries

Equivocation in a document, 1978

Equity, rebutted by declarations of intent, 1982

procedure in; *see* Chancery
rules in, distinguished from rules at law, 8

Erasure, expert testimony to, 1491

Error, impeaching a witness; *see* Contradiction

of ruling, as ground for new trial, 102

Escape, as evidence of guilt, 652
refusal to, as evidence of innocence, 294, 665

Escrow, shown by parol evidence, 1888, 1908

Estoppel, distinguished from an ordinary admission, 635

from a judicial admission, 2140

Evidence, defined, 1
distinguished from substantive law, and pleading, 3

rules of, whether alterable by the Legislature, 31

Evidence — *Continued*

admissible for one purpose but :
for another, 42

conditionally on other facts being shown, 45

even after jury has retired, explaining away, 117

inadmissible, when received, is not to justify other inadmissible evidence, 46

offer of and objection to, made making, 60-93

motion to "strike out," 82

ruling upon an objection to, 94

erroneous exclusion cured by subsequent admission, 90

circumstantial and testimonial, distinguished, 107

circumstantial may be proved by circumstantial, 122

presence of articles as corroborating, 197

what is "corroborative," 1520

fabrication of, as indicating guilt, 654

to be weighed by probability, not possibility, 265

failure to produce, as indicating :
weak case, 658

length no ground for exclusion, 117

order of presentation, 1352

in rebuttal, advanced by anticipation, 1353

manufacturing, 1213

"best evidence" rule, 746

primary and secondary, 746, 822, *Et*
prima facie, 2002

sufficient for jury, 2002

motion to exclude all, 2006

preponderance of, 2027

procured by illegal search or seizure, 1738

demurrer to, 2006

judge's right to determine sufficiency and admissibility, 2101

order of, in general, 1352

illegally obtained, 1656

order of topics of, in trials; *see* Examination

primary; *see* Best Evidence; Original Document

conclusive; *see* Conclusiveness

weight of; *see* Weight

circumstantial; *see* Circumstantial
see also Offer

Examination of Premises, chattels, etc.; *see* Discovery; Party's Privilege; Real Evidence

Examination of Witness
I. *Before a Magistrate*
magistrate's report of former testimony, whether required, 890, 902
whether admissible, 1137
former testimony before, without cross-examination, 914

INDEX OF TOPICS

[Numbers refer to sections §§]

amination of Witness — *Continued*
dying declaration under oath, 963
testimony proved

by magistrate's report, 1137
by stenographer's notes, 1139
see also Deposition

II. *Right of Cross-examination; see*
Cross-examination, I

III. *Order of Examination at Trial*

(a) *in general*
trial court's discretion controls,
1352

length of time immaterial, 1350

(b) *putting in the case at large*
case of proponent in chief
order of topics, 1353
party testifying first, 1353
facts conditionally relevant,
1360

matter without *prima facie*
relevancy, 1360

rejected matter later relevant,
1360

irrelevant questions on cross-
examination, 1360

reading documents, 1372

case of opponent in reply, 1362
calling witness during proponent's
case, 1362

case in rebuttal, in general,
1365

before opponent closes, 1362
limitations on evidence in rebut-
tal, 1365

anticipation of case in rebuttal,
1365

case in surrebuttal, 1366

later stages, 1366

(c) *after case closed*

one case closed, 1367

evidence admitted after case
closed, 1367

both cases closed, 1367

argument begun, 1367

charge given, 1367

jury retired, 1367

verdict rendered, 1367

(d) *examination of a witness on*
the original call

direct examination, 1372

putting in documents, 1372

cross-examination, 1372

postponement, 1372

two or more opponents, 1372

offering documents, 1372

putting in one's own case,
1376

see also Cross-Examina-
tion

whose is the witness, 1378

re-direct examination, 1379

re-cross-examination, 1380

later stages, 1380

(e) *recall*

for re-direct examination, 1381

for re-cross-examination, 1381

Examination of Witness — *Continued*

IV. *Sundries*

effect of death or illness prevent-
ing cross-examination, 922

refusal to answer on cross-ex-
amination, 924

non-responsive answer, 925

of opponent or witness before
trial; *see* Discovery

at a former trial, used to aid
recollection; *see* Recollection

mode of putting questions on;
see Question to a Witness;

Cross-examination

see also Direct Examination

specific topics on direct examina-
tion; *see* Direct Examination

specific topics on cross-examina-
tion; *see* Cross-examination

confession made under oath on;
see Confession

of a party as witness; *see* Wit-
ness

admissibility of prior examina-
tion; *see* Deposition; Former

Testimony

Examined Copy; *see* Copy

Exception to a ruling upon evidence,
mode of taking, 97

bill of, must exhibit grounds of objec-
tion, 83, 100

purpose of an, 97

distinction between objection and, 97
must be in writing, 99

must be immediately after ruling, 98
what formal statement of, must con-
tain, 100

bill of, as evidence of testimony, 1138

Excitement; *see* Mental Condition,
Declarations of; Spontaneous Ex-
clamations

Exclamations of pain or suffering, 1202
as *res gesta* of violent injury, 1202

Execution of Document

In general

general principle, 1591

proof not needed when execution
admitted, 1596

rule of presumption, 1604

I. *Modes of proving Execution*

(a) *by age*

general principle, 1608

thirty years old, 1609

periods between which age is
reckoned, 1609

natural custody, 1611

unsuspicious appearance, 1612

possession of the land, 1613

recorded deeds and old copies,
1614

authority to execute, 1617

kinds of documents, 1618

attesting witness dispensed with,
870

(b) *by contents*

in general, 1620

INDEX OF TOPICS

[Numbers refer to sections §§]

Execution of Document — *Continued*

- illiterate's letter; typewriting, 1620
 - printed matter, 1621
 - postmark; brand, 198, 1593
 - reply-letter by mail, 1625
 - reply-telegram, 1626
 - reply-telephone, 412, 1594
 - identity of name, 2082
 - (c) *by official custody*
 - judicial records and files, 1630
 - sundry official records, 1630
 - (d) *by seal*
 - general principle, 1633
 - statutory regulation, 1633
 - seal of State, 1638
 - seal of court or clerk, 1639
 - seal of notary, 1640
 - sundry official seals, 1641
 - official signatures, 1642
 - official title, 1635
 - corporate seal, 1643
 - (e) *by other modes*
 - by handwriting; *see* Handwriting
 - by possession, 203
 - by parties' belief, 293
 - by opponent's admission, 1597
 - by spoliation, 1597
 - by sundry circumstantial evidence, 1596
 - by presumption, 1604, 2069
 - by attesting witness; *see* Attesting Witness
 - by certificate of acknowledgment; *see* Certificate
 - by certified record-copy; *see* Certified Copy; Recorded Conveyance
 - of a will, by testator's belief, 293
 - by testator's expressions, 1218
 - by record of probate, 1118, 1160
- ### II. Sundry rules
- production required, even though execution is presumed, 757
 - execution must be proved, though original is lost, 1601
 - execution provable, without producing original, 800
 - order of proof as between execution and loss, 758
 - calling the attesting witness; *see* Attesting Witness
 - writer not a preferred witness, 897
 - written statements against interest, 978
 - pedigree entries, 997
 - showing document to opponent before cross-examination, 1345
- ### Execution of Judgment; *see* Judicial Record; Sheriff
- ### Executive, acts of, proved by certified copy, 1152
- by printed copy, 1164, 1622
 - privilege of, in substantive law, 1849
 - as witness, 1850
 - not to attend court, 1688

- Executor, admissions of, 686, 688
- rebutting intimation of gift to, 180
- waiver of client's privilege by, 180
- of patient's privilege by, 180
- Exhibition of weapons, bloody clothes, etc., to jury, 731
- of corporal injuries in civil case, 731
- of indecencies, 732
- Existence of whole inferred from part, 342
- concurrent, 342
- Ex parte proceedings, rules in, distinguished, 8
- see also* Affidavit; Deposition
- Expectancy of life; *see* Life
- Expediente; *see* Deed
- Expenses of witness, tender of, 165
- amount of, 1681
- expert witness, 1683
- Experience, capacity of, 378
- observation and knowledge distinguished, 400
- grade of, necessary, 379
- determined by judge, 381
- expert testifying to another's competency, 1470
- method of securing unbiased expert, 1991
- qualification of, on value, 422
- impeaching of witness for lack of, 558
- Experiment, as evidence of plan of crime, 267
- distinguished from observation, 180
- of the quality or condition of a thing, 345, 404
- to test a witness' knowledge or skill, 558-562
- as allowable in court, 730, 732
- Expert Witness
 - 1. *Qualifications*
 - general requirements, 378, 1410
 - stating the grounds of opinion, 402
 - foreign law, 383, 408
 - custom and usage, 383
 - value, 422
 - medical matters (sanity, blood, etc.), 384, 408
 - handwriting and paper money, 385, 418, 420, 1481-1488
 - sundry topics of testimony, 387
 - mode of securing unbiased experts, 1991
 - reputation to prove qualifications, 1078
 - see also* Knowledge; Physician
 - 2. *Impeachment*
 - by another expert, 1470
 - by cross-examination to instances of unskilfulness, 559
 - by contradiction on particular facts, 570, 577
 - by reputation, 1078
 - see also* Impeachment; Cross-examination, IV

INDEX OF TOPICS

[Numbers refer to sections §§]

Expert Witness — Continued

3. Sundries

failure to call, as evidence of a weak case, 660
 cross-examination to other sales as evidence of value, 357
 comparison of handwriting by, 1488
 proving voluminous records by summary, 782
 testimony to forgery of bank-note, 897
 may testify from both observation and hypothetical questions, 1417
 hypothetical questions to; *see* Hypothetical Question
 testimony by quotation of scientific books, 1177
 tested on cross-examination, 1177
 opinion of, as to cause of condition, 1463
 on alterations, date, decipherment, erasures, forgeries, imitation, ink, paper, spelling, 1491
 inspection of injured person by, 1704, 1991
 limitation of number of, 1401
 psychological, to test witness' credit, 560, 565
 judge may select and call, 1991
 amount of fee demandable by, 1682
 see also Opinion Rule; Fees
 Explanation, logical principle of, 117
 of traces of blood, 197
 of presence of incriminating articles, 197
 of flight as evidence of guilt, 664
 of possession of stolen goods, 1245
 Explosion, cause of, as evidenced by its effects, 340-355
 Ex post facto law, prohibition of, as affecting rules of evidence, 31
 Express package, delivery of, as evidenced by course of business, 172
 Extortion, other offences as evidence of intent, 309
 Extrinsic Testimony, rule for, as distinguished from cross-examination, 500
 to prove bias of a witness, 532
 to prove crimes or other misconduct of a witness, 550
 to impeach witness, 552
 to prove errors, 567
 to prove self-contradiction, 575
 Eye-witness, called by the State, may be impeached, 515
 of a crime, required to be called, 1534
 preferred in various instances, 897
 required in bigamy, 1537
 in criminal conversation, 1537
 not required when proof is by admissions of marriage, 1542
 not required in civil cases, 1542

Eye-witness — Continued

marriage celebrant's certificate not preferred to, 1543

F

Fabrication of evidence, as indicating guilt, 654
 Fact, law distinguished from, 1
 not in issue, distinguished from facts not admissible, 3
 meaning of "collateral," 120
 external, as evidence, 215
 a feeling is a, 1200
 presumption of, 2012
 jury or judge to determine, 2100
 Factory; *see* Employee; Negligence;
 Premises; Machine
 Factum probandum, distinguished from *factum probans*, 3
 Failure to prosecute or complain, 657
 to produce evidence, 658-662
 to object to evidence, 90
 to speak or claim, as a self-contradiction, 588
 as an admission, 666
 to reply to a letter, as an admission, 671
 Falsa demonstratio non nocet, 1983
 False Arrest; *see* Arrest
 False Claim, of cause of action, mode of evidencing intent, 307
 as impeaching a witness, 544
 False Pretences; *see* False Representations
 False Representations, repute as evidence of knowledge, 285
 other false representations as evidence of intent, 303
 Falsehood, as evidence of guilt, 654
 as impeaching a witness, 544, 573
 Falsity, by party in course of litigation, 654
 knowledge of, in similar acts, 302, 303
 in value of importations, 307
 of statement not admissible to show statement not made, 325
 of representations as to credit, 285
 as impeaching a witness; *see* Contradiction; Falsus in uno; Perjury;
 Self-contradiction
 Falsus in uno, general principle, 573
 falsity must be wilful and material, 573
 Family, insanity of, as evidence, 263
 Family History, statements about, exception to the Hearsay rule, 980
 death of declarant, 981
 ante litem motam, 983
 declarations by non-relatives, 987
 by neighborhood-reputation, 984
 by different sorts of relatives, 988
 proof of relationship, 991, 989
 illegitimate child, 990
 own age, 994
 identification by, 293, 334, 991

INDEX OF TOPICS

[Numbers refer to sections §§]

- Family History — *Continued*
 form of declaration (Bible, will, etc.), 992
 proving the writing, 997
 place of birth, death, etc., 995
 issue of pedigree, 996
 age, other modes of proving; *see* Age
 ancient deed's recital of pedigree, 1040
 Family Relationship, as biasing a witness, 536
 Father, reputation of, as mitigating damages in seduction, 157, 239
 presumed instead of son, from identity of name, 2082
 statements of, to evidence pedigree; *see* Family History
 testimony to bastardy, 398, 1521
see also Bastardy; Legitimacy;
 Mother
 Federal Law, conflict between State law and, 21
 judicially noticed, 2132
 requiring full faith and credit, 1160
 Feelings, expressions of, 1201, 1212
see also Bias
 Fees of witness, tender in advance, 1680
 amount of, 1682
 expert witness, 1685
 Fellow-servant; *see* Employee
 Felony, as disqualifying or impeaching a witness; *see* Conviction of Crime
 Fence, erection or removal of, intent shown by utterances, 1246
 Fifth Amendment; *see* Fourth Amendment; Self-Crimination
 Files; *see* Judicial Records; Public Documents
 Fire; *see* Arson; Sparks; Premises
 Fire Insurance; *see* Insurance
 Flight, as evidence of guilt, 652, 2064
 Flowage of water, other instances as evidence, 350
 Food, effect of, as indicating nature or quantity, 352-354
 Footprint, as evidence of identity, 334
 compelling defendant to make, 1739
 Foreign Language; *see* Interpreter; Alien
 Foreign Law, when applicable in its rules of evidence, 17
 distinguished from *lex fori*, 17
 proved by expert witness, 383, 408, 1447
 knowledge of, as based on study alone, 408
 proved by treatises, 1173
 statute proved without copy, 829
 copy preferred to recollection, 829
 proved by official printed copy, 1164, 1622
 crime by, not privileged, 1733
 similarity of, presumed, 2091
 judge or jury to determine, 2115
 not judicially noticed, 2132
 Foreign Officer, document made by, 1092
 Foreman, entries of, to aid recollection; *see* Recollection
 character and conduct of, as employee; *see* Employee
 Forfeiture, privilege not to disclose, 1732
 Forgery, of a will, character of a third person as evidence of, 151
 skill in handwriting, as evidence, 168
 possession of materials, as evidence of, 200, 267
 of evidence, as indicating guilt, 69
 other forgeries, as evidence of intent, 302
 forms of offence connected with, 31
 evidence of a motive for, 326
 of identity, 334
 proof of, without producing document, 801
 notice to produce original document, 768
 testimony of person whose name is forged, not required, 897
 proved by expert, 897
 of bank-notes, evidence of intent, 302
 incorporation proved by receipt, 1087
 affidavit of bank-officer, 1187
 expert testimony to handwriting of, 1491
 presumed from uttering, 2069
 Former Testimony offered in impeachment, as a self-contradiction, 581
 failure to mention facts in, as contradiction of present testimony, 668, 670
 death, absence, etc., as allowing the use of, 931
 used as an admission, 677
 magistrate's report preferred, 891, 902
 issues and parties the same, 919
 mode of proving
 judge's notes, 1336
 magistrate's report, 893, 902, 1137
 bill of exceptions, 1138
 stenographer's notes, 1139
 juror's notes, 1139
 attorney's notes, 1139
 printed report, 1181, 1622
 answer by referring to, of another, 493
 memorandum to aid recollection; *see* Recollection
 whole must be proved, 1549, 1552, 1563
 may be proved, 1576
 Fornication, under age of consent, 311, 330
 prior and subsequent conduct in, 330
see also Adultery, Criminal Conversation; Prostitution

INDEX OF TOPICS

[Numbers refer to sections §§].

Foundation, laying a, for impeaching by self-contradiction; see Impeachment
for using a copy of a document; see Original Document
in general, 401
waiver of laying, 401
must show knowledge founded on personal observation by the senses, 405

Fourth Amendment

does not prevent use of documents and chattels obtained by search warrant, 1738

as affected by Fifth Amendment, on admission of documents, 1738

Fraud, by a party or agent, as evidence of a weak case, 656

transfers as evidence of, 306

as evidence of intent, 307

similar acts of, 307

confession obtained by, 714

as impeaching a witness, 544

privilege against self-crimination in, 1732

not all civil fraud is criminal, 1732

making acts voidable, 1913

under the parol evidence rule, 1927, 1936

degree of proof of, 2027

presumed from grantee's confidential relations, 2047

in insurance; see Insurance

Frauds, statute of; see Statute of Frauds

Fraudulent Transfers, other transactions as evidence of intent, 306

admissions of debtor or creditor, 692

opinion evidence of intent, 1458

presumptions applicable to, 2048

Fright of horses, as evidence of dangerous object, 355

G

Gaming, other acts as evidence of intent, 314

advertisement, or possession of apparatus or license as evidence of plan, 267

premises leased for, proved by repute of house, 286

conclusive evidence of, under statute, 906

Gas; see Nuisance

Genealogy proved by family hearsay; see Family History

proved by reputation of community; see Reputation

General Character; see Character

General Interest, matters of; see Reputation

Genuineness, of a document; see Document

Gestation, intercourse within the time of, in bastardy, 191
in adultery, 2080

Gesture, as a mode of expression for a witness, 479

Gift, plans, as evidence of, 184
declarations of intent to evidence a, 1208

words accompanying, 1246

see also Deed

Girl; see Child; Rape; Seduction

Good Faith; see Knowledge; Motive; Intent

Goods; see Chattels; Business; Value

Government, land-grant of; see Deed

records of; see Public Document

privilege for communications to, 1837

Grand Jury, witnesses before, indorsed on indictment, 1327

right to compel answers, 1731

testifying before, as a waiver of privilege, 1751

privilege for vote and opinion, 1830

for witness' testimony, 1834

cessation of privilege, 1834

admissions before, not privileged, 1836

not to impeach indictment, 1947

Grant, presumption of lost, 2069

of land, from government, 781, 791

see also Deed; Grantor; Grantee

Grantee

from an insolvent, lunatic, thief, etc., repute as evidencing knowledge of, 285

grantor's admissions, used against, 692

producing original deed of, 781

utterances in possession, used against creditor, 1249

deed delivered in escrow to, 1888, 1908

presuming fraud from confidential relations of, 2041

presuming identity from name, 2082

Grantor, admissions of, 692

declarations of, to show intent, 1208
opinion testimony to capacity of, 1454

burden of proof of sanity of, 2041

see also Grantee

Guardian, admissions of, 686

personal liability of one who signs as, 1934a

Guilt

conduct when under arrest to show, 650, 652, 668, 670

evidenced by concealment, 652

by bribery, 654

by fabrication of evidence, 654

by destruction of evidence, 654

by flight, 664

by escape, 652

negated by refusal to escape, 294, 665

see also Defendant; Consciousness of Guilt

Guilty, plea of, as admission in civil case, 683

Gun; see Weapon

INDEX OF TOPICS

[Numbers refer to sections §§]

H

- Habeas Corpus ad testificandum**, 1663
- Habit**, as evidence of doing an act, 170
distinguished from character, 170
of private person, 172
of commercial house, 172
of express carrier, 172
of telegraph company, 172
as evidence of *not* doing an act, 174
of recording, 174
particular instances to evidence careful or careless, 228, 316
as evidence of marriage, 293
of other persons, as evidence of care, 355
as a source of aiding recollection of a witness, 433
see also Custom
- Habitual Criminal**, prior convictions as increasing sentence, 222
- Handwriting**
I. *Style of*, to evidence authorship of a document
general theory, 175, 321
jury's perusal of specimens, kinds of documents, 1488
press-copies, 1485
photographic reproductions, 484, 1465, 1485
mode of proving genuine, 1483
see also Typewriting
- II. *Qualifications of Witness to (a) in general*
by experience, 385
(b) *by seeing the person write*, 419
number of times, 419
how long beforehand, 419
quantity of writing, 419
specimens written after suit begun, 419
- (c) *by seeing known genuine documents*, 420
express or implied admissions, 420
acting on the document, 420
correspondence seen, 420
clerks seeing accounts, etc., 420
custodian seeing records, etc., 420
bank-notes and paper money, 420
- (d) *by expert comparison of hands*
lay witness excluded, 1479
exception for ancient documents, 1477
refreshing the memory, 1478
- (e) *expert testimony*, whether admissible, 1480
selection of specimens, 1484
specimen conceded genuine, 1480
genuineness left to court, 1480
specimens limited to documents in case, 1480
studying the specimens, 1480
photographic copies, 484, 1480
kind of skill required, 1480
mode of proving specimens, 1480
giving the grounds of belief, 1487
submitting the specimens to the jury, 1488

Handwriting — Continued

- testing on cross-examination, 148
- III. *Sundry Topics*
proof of, by admissions, 1483
ink, paper, spelling, etc., 1491
deciphering illegible writing, 1491
imitations, forgeries, 1491
normal or disguised, 1491
erasures, alterations, 1491
time of writing, 1491
defendant's skill in imitating, 1491
evidence of forgery, 168
reference to, in aid of recollection.
see Recollection
effect of proving attesting witness' maker's hand; *see* Attesting Witness
- Health**, as evidenced by appearance, 246
prior condition of, 250
witness' experience as qualifying him, 384
- Hearing a sound**, instances of, 354
- Hearsay**, as the basis of a witness' knowledge, 405, 409
knowledge founded on, exceptionally admitted, 406-412
official records, 407
scientific instruments and tables, 408
execution and contents of documents not personally observed, 410
testifying to own age, or another's name, 411
conversation through interpreter, 1283
- information over telephone, 412
nature of, 910
- Hearsay Rule**
I. *General Principle*
II. *Exceptions to the Rule*
III. *Rule not applicable (Res Gestæ)*
IV. *Rule Applied to Court officers*
- I. *General Principle*, 910
(a) *cross-examination*, right of theory and art, 913
opportunity, equivalent to actual cross-examination, 917
sundry tribunals, 914
coroner, 914
committing magistrate, 914
deposition, 916
notice, 916
plural taking, 916
statutes, 916
affidavit, 918
issues and parties the same, 919
either party may use deposition, 921
insufficiency of cross-examination, 922
witness' death or illness, 922
witness' refusal or party's default, 924
non-responsive answer, 925
sundries, 927

INDEX OF TOPICS

[Numbers refer to sections §§]

Hearsay Rule — Continued

- (b) *confrontation*, right of
 - absent witness' testimony**, in general, 928
 - constitutional requirement**, 929
 - witness unavailable in court**, 930
 - deceased, 931
 - out of jurisdiction, 932
 - not found, 933
 - ill, 935
 - imprisoned, 936
 - privileged, 936
 - beyond statutory distance, 937
 - insane, 938
 - disqualified, 938
 - proving the excuse, 940
 - witness present in court**, 941
 - rule not applicable**, 942
 - exceptions to the rule of confrontation**, 945

II. *Exceptions to the Rule*, general principle of, 950

declarant must have usual testimonial qualifications, 950

disqualification of declarant; *see* Declarant

of spouse; *see* Marital Relationship

of oath capacity; *see* Oath

dying declarations; *see* Dying Declarations

facts against interest; *see* Against Interest

pedigree statements; *see* Family History

attesting witness; *see* Attesting Witness

entries in the course of business; *see* Regular Entries

private boundaries; *see* Boundaries

ancient deed-recitals; *see* Recitals

deceased persons in general; *see* Deceased Persons

reputation; *see* Reputation

public documents, official statements; *see* Public Documents

scientific books; *see* Learned Treatises

price-lists, directories, etc.; *see* Commercial Lists

affidavits; *see* Affidavit

voter's statements; *see* Voter

mental condition, physical pain; *see* Mental Condition

res gestæ; *see* Res Gestæ

III. *Rule not applicable (Res Gestæ)*, 1240

fact of utterance in issue, rule not applicable, 1240

truth of utterance in issue, rule applicable, 1240

(a) *words a part of the issue*

contract, libel, etc., 1242

(b) *words a verbal part of an act*, 1245

general principle, 1245

acceptance, advancement, agency,

Hearsay Rule — Continued

consideration, conversion, dedication, 1246

delivery, entry, gift, larceny, loan, payment, sale, sundries, 1246

possession, in prescriptive title, 1247

in presumption of ownership, 696, 1249

accused found with stolen goods, 1250

testator revoking a will, 1222

bankrupt evading creditors, 1251

domicil, 1253

(c) *words used as circumstantial evidence*, 1255

in proving search for lost document, 762

third person's knowledge, belief, diligence, good faith, motive, reasonableness, sanity, viciousness, etc., 1256

speaker's state of mind, 1257

identifying a time, place, or person, 1258

impeaching a witness by self-contradiction, 575, 1259

IV. *Rule applied to Court Officers; see Juror; Judge; Counsel; Interpreter*

Height, as evidenced by other conditions or effects, 342, 350, 355

Heir, admissions used against, 688

Heredity of illness, as evidence, 248

of insanity, 263

inference from, 168

Highway, evidencing owner's knowledge of danger of, 284

repairs, as evidence of negligence, 649

condition at another time or place, as evidence of defect, 340

injuries of other persons, as evidence of defect, 353

similar precautions, as evidence of safety, 355

see also Dedication

History, Books of, used in evidence as representing reputation, 1062

as scientific treatises, 1170, 1175

judicially noticed, 2135

Homicide, character of deceased in, to evidence self-defence, 141, 278

moral character of deceased in, 1469

accused's threats, as evidence of, 177

deceased's threats, as evidence of aggression, 182, 279

survival of alleged deceased, as negating *corpus delicti*, 193

threats of a third person, as evidencing innocence of the accused, 194

suicidal plans of deceased, as evidencing innocence of the accused, 195

possession of booty or tools, as evidence of, 200

INDEX OF TOPICS

[Numbers refer to sections §§]

Homicide — Continued

- traces of blood, etc., as evidence of, 197
- acts of violence, on an issue of self-defence, 225, 280
- conduct as evidence of accused's sanity, 252, 256
- other acts of violence, to show defendant's intent, 312
- intrigue of wife-murderer with paramour as showing motive for, 187
- circumstances showing a motive, 325
- conduct as evidence of malice, 329
- weapon, clothing, etc., as evidence of identity, 334
- dying declarations in, 952
- marital privilege in, 1723
- burden of proof of self-defence in, 2066
- Horse, character of, as evidence of behavior, 151
- fright of, as evidence of dangerous object, 284, 355
- pedigree of, 1180
- see also* Animal
- Hostility of deceased shown by details of prior quarrels, 329
- former, of witness; *see* Impeachment (g)
- see also* Deceased by Homicide
- House; *see* Premises; Property
- House of Ill-fame, character of, 163
- character of inmates of, 163
- other acts, as evidencing character, 233
- as evidencing intent, 314
- provable by reputation, 1078
- Husband, testimony of, as disqualified or privileged; *see* Marital Relationship
- notice to, as evidence of wife's knowledge, 277
- admissions of, against wife, 687, 697, 1713
- statements of, to evidence pedigree; *see* Family History
- expressions of affection or dislike, 1212
- motive or desire of, to get rid of wife, 215
- communications by or to, as privileged; *see* Marital Relationship
- presumption of coercion by, 2065
- see also* Criminal Conversation; Homicide
- Hypnotism, showing influence of, on witness, 558
- Hypothetical Question
- general theory, 1416
- as "usurping province of jury," 1416
- when allowed or required, 1417
- may be put only to expert, 1419
- form and scope, 1420
- abuse of, 1421
- all undisputed facts need not be included in, 1421

I

Identity

- as evidenced by traces, of accused — other party, 196, 197
- by other crimes, 335
- by family history or hearsay, 293, 991
- by voice, 404
- over telephone, 412, 1594
- by stature, 404
- condition of light as affecting, 730
- by appearance, 404, 730
- by witness' former recognition, 443, 619
- by photograph, 404, 480, 730
- by footprints, 1739
- by placing hat on accused's head, 1739
- of voice, as shown by utterance, 730
- of person, place, chattel, etc., in general, 333
- by clothing, 333, 404
- of brand or mark on stock or number, 198, 1593
- of maker of attested document, 887
- of a time or place, as shown by utterances, 1258
- opinion testimony to, 1464
- of document, shown by ink, paper, etc., 1491
- original required, 796
- presumption of, from identity of name, 2082
- of grantor or grantee, 2082
- of signer of affidavit in chancery, 2082
- of one convicted of crime, 2082
- of party to marriage, 2082
- of names in tracing title, 2082
- Idiot; *see* Sanity; Interpreter; Witness; Oath
- Illegality in obtaining evidence, not to exclude it, 1656
- Illegible Document, production of original, 781
- expert testimony to, 1491
- verbal precision in, 1566
- Illegitimacy, character of third person as evidence, 151
- adultery, as evidence of, 193, 207
- non-access, as evidence of, 193
- as evidenced by family hearsay; *see* Family History
- by neighborhood-reputation, 1069
- see also* Legitimacy; Bastardy
- Ill-fame, house of; *see* House of Ill-fame
- Illiterate, signature by mark, whether identifiable, 418
- as attesting witness, 886
- Illness, test when evidence is offered of, as result of eating certain food, 117
- as evidenced by appearance, 246, 340
- prior and subsequent condition of, 250, 340

INDEX OF TOPICS

[Numbers refer to sections §§]

ness — Continued

insured's knowledge of, as evidenced by declaration, 290

symptoms, as indicating cause of, 352

witness' experience in, as qualifying him, 384, 408

as impeaching a witness, 526, 570

as excusing absence of attesting witness, 875

of deponent, 935

of declarant of facts against interest, 967

of maker of regular entries, 1003

of witness summoned, 1686

as excusing lack of cross-examination, 922

expressions of suffering in, 1201

privilege for communications to physician, 1855

see also Physician; Poison; Health

indecible; see Idiot

immaterial, distinguished from incompetent and irrelevant, 71

immateriality of evidence, cured by other immaterial evidence, 46

see also Irrelevancy

immunity,

to witness, destroys privilege against self-crimination, 1754

what disclosures entitle a witness to, under statute, 1754

mode of obtaining, under statute, 1754

before judicial officer, 1754

before administrative officer, 1754

testimony before grand jury, 1836

of witness, from arrest, 1671

impeaching one's own instrument, forbidden, 377

impeachment of a Witness

(a) *general principles*, 500

point where party becomes witness for impeachment, 1378

(b) *persons impeachable*, 501

hearsay witnesses (dying declarant, attesting-witness, etc.), 501, 960, 1001

attesting witness, 1001

accused as witness, 501

impeaching an impeaching witness, 503

one's own witness, 504

general principles, 504

by immoral character, 505

by bias, interest, or corruption, 506

by bribery, 506

by prior self-contradiction, 507

by contradiction with other witnesses, 508

who is one's own witness, 509

unused deposition, 510, 511

witness called by judge, 509, 515

Impeachment — Continued

opposing party as witness, 513

co-party witness against co-party, 514

necessary witness, 515

using opponent's deposition, 510

book of regular entries by clerk or party, 1009, 1031

expert witness and scientific books, 1177

(c) *moral character* in general, 518

general principles, 518

kind of character, 518

specific traits, 520

witness and party distinguished, 519

time of character, 522

place of character, 522

(d) *insanity*, etc., 523

insanity, 524

intoxication, 525

disease, 526

age, 526

morphine habit, 526

defect of speech, 526

religious belief, 527

race, 527

(e) *experience*, 558

(f) *bias, interest, and corruption*,

modes of evidencing, 532

general principles, 532

cross-examination, 533

demeanor as evidence, 534

(g) *bias* from circumstances and

conduct, 535

relationship as evidencing bias,

536

pecuniary relations to show bias,

536

details of a quarrel, 538

preliminary inquiry to witness, 539

opinion as to another's bias, 1458

see also Bias

(h) *corruption*, 541

willingness or offer to swear

falsely, 541

confession of false testimony, 541

attempt at subornation or bribery,

542

receipt of money, 543

sundry corrupt conduct, 544

preliminary inquiry to witness, 545

see also Corruption

(i) *interest*, in civil cases, 546

in criminal cases, 547

bonds, rewards, detective-employment, insurance, etc., 548

see also Interest

(j) *moral character*, evidenced by

misconduct, 550

extrinsic testimony, 550

particular acts of misconduct, 550

record of conviction, 555, 828

arrest or indictment as affecting credibility, 552

INDEX OF TOPICS

[Numbers refer to sections §§]

Impeachment—*Continued*

- pardon as affecting credibility, 555
- cross-examination, 552
- relevant questions excluded for policy, 554
- privilege against disgracing answers, 1701
- rumors, on cross-examination, 557
- by reputation, 1071
- by personal opinion, 1469
- belief on oath, 1471
- see also* Character
- (k) *skill, memory, knowledge*, as tested on cross-examination, 429, 558, 562
- incapacity evidenced by particular errors, 562
- grounds of expert opinion, 562
- testing capacity to observe, 562
- opportunity to observe, 562
- by testing capacity of memory, 562
- expert to handwriting, 1487
- psychological expert, 560, 565
- (l) *contradiction by other witnesses*, 567
- collateral matters, 567
- unfair surprise in, 567
- test of collateralness, 568
- collateral questions on cross-examination, 572
- supporting contradicted witness on direct examination, 571
- bias, corruption, skill, knowledge, memory, 570
- (m) *falsus in uno*, 573
- (n) *self-contradiction*, 574
- general principles, 574
- rules for avoiding Unfair Surprise and Confusion of Issues, 574
- collateral matters, 575
- test of collateralness, 575
- facts not collateral, 576
- bias, corruption, skill, knowledge, 577
- preliminary warning necessary, 579
- specifications necessary in warning question, 581
- absent or deceased witness, 582
- depositions, 582
- testimony at a former trial, 582
- dying declarations, 582
- attesting witness, 582
- testimony admitted by stipulation, 582
- contained in other sworn testimony, 583
- recall to put the question, 580
- contradiction admissible, 585
- contradiction must be independent of present answer, 578
- what is a self-contradiction, 586
- admissions as contradictory utterances, 586

Impeachment—*Continued*

- joint statement, 586
- conduct, 586
- opinion, 587
- silence, omission to claim or explain, 588, 590
- explaining the contradiction, 588
- putting in the whole, 591, 1588
- showing the writing to the witness, 812
- distinguished from admissions of party's admissions; *see* Admissions
- testimony before grand jury, 1836
- (o) *sundry modes*
- of witness who proves document, 1378
- of attesting witness, 1001
- by annoying questions, 468
- by repetition of questions, 469
- by conviction of crime; *see* Conviction of Crime
- for restoring credit; *see* Witness IV
- (p) *absent witness*, impeached in others, 582
- see also* Contradiction; Cross-Examination, IV; Dying Declarations; Excluded Witness, II; Question to a Witness
- Implied admissions, 641
- self-contradictions, 588
- Importation, other transactions as evidence of fraud in, 307
- Impotency, inspection in divorce, 172
- Impression, as distinguished from knowledge, 403
- from type, as evidence of another, 340
- as sufficient in point of memory, 428
- as opinion testimony, 1459
- excluded if founded on guess or rumor, 1459
- Imprisonment, as excusing absence of an attesting witness, 876
- of a deponent, 936
- see also* Conviction of Crime
- Inadmissible evidence, as justifying other inadmissible evidence, 46
- Incest, other offences, as evidence of intent or motive, 330
- sexual desire as evidencing, 330
- who is accomplice in, 1517
- eye-witness of marriage, 1537, 1542
- Incompetent evidence; *see* Admissibility; Irrelevancy
- employee; *see* Employee
- physician; *see* Physician
- persons in general; *see* Skill; Negligence
- Inconsistency, as impeaching a witness; *see* Self-Contradiction
- Incorporation, reputation to prove, 1087
- presumed, 2090

INDEX OF TOPICS

[Numbers refer to sections §§]

decency, of exhibition to jury, 732
 as ground for exclusion, 1652
 decent Assault, plaintiff's character,
 as mitigating damages, 156, 239
 see also Rape
 decent Exposure, other offences, as
 evidence of intent, 311
 indemnity against self-crimination,
 1754
 Indians, as witnesses; *see* Race
 indictment, as disqualifying a co-in-
 dictee, 389
 as impeaching a witness, 536, 552,
 555
 list of witnesses indorsed on, 1327
 privilege for grounds of, 1832
 for assent of grand jurors to,
 1947
 indorsement, of witnesses on the in-
 dictment, 1327
 on bond, as statement against inter-
 est, 970, 975
 of bill of exchange; *see* Bill of Ex-
 change
 indorser, parol agreement collateral to
 instrument, 1934a
 see also Bill of Exchange
 inducement to a confession; *see* Con-
 fession
 inductive form of inference, 117
 industry, facts of, judicially noticed,
 2135
 infamy, disqualifying a witness, 375
 excusing absence of attesting witness,
 877
 privileged from disclosure, 1701
 see also Conviction of Crime
 infant, disqualification as a witness,
 370
 admissions of, 634
 dying declarations of, 957
 opinion to capacity of, 1454
 presumption of incapacity for crime,
 2065
 see also Age; Child
 inference, modes of, 117, 360
 from failure to produce evidence,
 658, 1748
 of witness must be based on adequate
 data, 404
 of non-occurrence by reason of fail-
 ure to see or hear, 413
 infidel; *see* Religious Belief
 information, list of witnesses indorsed
 on, 1327
 received by a person; *see* Knowledge
 informer, privilege for communications
 by, 1837
 infringement; *see* Copyright; Patent
 inheritance, proof of; *see* Family His-
 tory
 character of third persons, to prove
 illegitimacy in, 151
 initials, document signed with, 1635
 injury, repairs after, as evidence of
 negligence, 649

Injury — *Continued*
 cause of, as evidenced by its effects, 340
 similar injury to other persons from
 same cause, 353
 see also Corporal Injury; Ill-
 ness; Negligence; Highway;
 Machine; Premises
 ink, expert witness to nature of, 385,
 1491
 identification of document by, 1491
 innocence, consciousness of, as evi-
 dence, 211, 294, 665
 failure to protest one's, 650, 657, 670
 presumption of, 2064
 applied to bigamy, 2059
 see also Defendant
 inquiries, as evidence of design to
 commit crime, 268
 see also Search
 inquiry of title, by the sheriff, 1130
 of lunacy, by commission, 1140
 of death, by the coroner, 1141
 of population, by the census, 1143
 insane Belief, as shown by facts told
 to the party, 256
 disproof of communications exciting,
 576
 insanity, mode of evidencing, 251, 562
 prior or subsequent condition to
 prove, 215, 264
 disinheritance as evidence of, 255
 as evidenced by environment, 261
 collateral or ancestral, 263
 of transferor to show notice by trans-
 feree, 285
 qualifications of witness to prove,
 384, 416
 as disqualifying a witness, 367, 524
 evidenced by inspection in court, 732
 excusing absence of attesting witness,
 877
 inquisition or adjudication upon,
 1140
 utterances of person to prove, 1218
 opinion rule to testimony to, 1430
 observation of, by prescribing physi-
 cian, 1859
 see also Sanity; Lunacy; Luna-
 tic; Mental Condition; Insane
 Belief
 insolvency, as evidence of non-pay-
 ment, 169, 243
 purchaser's knowledge of, evidenced
 by repute, 285
 evidenced by prior condition of, 326
 as a motive for crime or fraud, 326
 debtor's admissions, 688, 692, 697
 opinion testimony to, 1455
 prima facie evidence of banker's
 knowledge of, 906
 as evidenced by reputation, 1078
 see also Fraudulent Transfers
 inspection, of memorandum used to
 aid recollection, 440, 449
 of corporal injury, by jury or wit-
 ness, 1339, 1343, 1662, 1739

INDEX OF TOPICS

[Numbers refer to sections §§]

Inspection — *Continued*

- of real evidence, mode and place of, 730
- of corporation books before trial, 1335, 1342
- of document of opponent, as making it evidence, 1589
 - at trial, not privileged, 1662, 1703, 1738
- of chattels or premises, not privileged, 1662, 1705, 1738
- of document, premises, chattels, as permissible; *see* Real Evidence
- of documents, premises, chattels of opponent before trial; *see* Discovery
 - see also* Premises
- Instruction to the jury, where a fact is in part inadmissible, 42
 - to disregard evidence; *see* Strike Out
 - directing a verdict, 2006
- Instrument; *see* Document
- Insurance, lack of money to negative large stock of goods in loss by fire, 169
- insured's declarations, to show knowledge of illness, 290
- as evidence of motive for negligence, 326, 648
 - of bias or interest, 536, 548
- taking of policy, as evidence of ownership, 641
- against accident, as evidence of negligence, 536, 548, 648
- other fraudulent acts as evidence of intent, 307
- proofs of loss in, as an admission, 672
 - as *res gesta*, 1242
 - as coroner's official statement, 1141
- admissions of insured against beneficiary, 688
- inspection of policy before trial, 1335
- materiality of risk or representations, 1440
- privilege for communications to physician, 1866
- application signed by mistake, 1898
- collateral parole agreement to provide, 1935
- burden of proof of conditions in policy of, 2093
- policy in a single document, 1945
- warranty of, 1930
- proof of arson beyond reasonable doubt, 2027
- presumption of accident, from death, 2063
 - see also* Arson; Insurer
- Insurer, admissions of, 688
- Intemperance, as evidence of misconduct, 173, 232
 - as impeaching a witness, 526
 - proved by reputation, 1078
 - see also* Intoxication; Liquor-selling; Negligence

Intent, criminal, general theory :

- 271, 299
- definition of, 297
- to evidence anonymous crime, 299
- distinguished from design, etc., 297
 - motive, design, character, etc., 322
- other crimes, as evidence of, 302
 - abortion, 311
 - adultery, 330
 - arson, 310
 - bigamy, 330
 - burglary, 309
 - embezzlement, 305
 - enticement, 330
 - extortion, 309
 - false pretences, 303
 - forgery and counterfeiting, 302
 - fraudulent transfers, 306
 - homicide and assault, 312
 - incest, 330
 - indecent exposure, 330
 - larceny and kidnapping, 308
 - possession of stolen goods, 314
 - rape, 311
 - robbery, 309
 - seduction, 330
 - sodomy, 330
 - sundry frauds, 307
 - miscellaneous offences, 314
 - civil cases, 315
- declarations, as hearsay evidence of
 - see* Mental Condition, Declaration of
- testifying to one's own intent, 389
- testifying to another person's intent, 389, 1458
- expressions of, or motive, by defendant, 1213
- opinion evidence of, in dedication, 1458
- controlled by substantive law, 1458
- in slander and libel, 1459
- declarations of, used to interpret a document, 1976
- parole evidence of, to disinherit, 1982
- presumption of, in criminal cases, 2064
- jury to determine, in libel, 2113
- of party to a document; *see* Parol Evidence Rule
- proof of, by parole evidence; *see* Parol Evidence Rule
- information or notice, as evidence of; *see* Knowledge
 - see also* Motive; Intention
- Intention, testamentary or contractual, 184
 - opinion of another's intention, 1458
 - one's own intention, 389
 - distinguished from "meaning" 1955
 - to go to certain place, to evidence going, 1208
 - to commit suicide, 1208
 - see also* Design; Intent; Motive

INDEX OF TOPICS

[Numbers refer to sections §§]

tercourse; *see* Bastardy; Rape; Seduction; Incest; Pregnancy interest

- (a) *as disqualifying a witness*
general principle, 388
civil parties, 390
survivors, 391
accused, 389
co-indictees, 389
testimony to one's own intent, 389

voir dire, 393
mode of proving interest, 393
burden of proving, 393
time of making objection to, 393

judge determines, 393
time of interest, 393
husband and wife; *see* Marital Relationship
husband or wife of co-defendant, 396

dying declarant, 957
(b) *as impeaching a witness*
one's own witness, 506
parties and others in civil cases, 546
accomplices and co-indictees, 547
accused, 546
bonds, detective-employment, insurance, rewards, 548
real party injured, 548
restoring credit by consistent statements, 617

- (c) *as excusing absence of a witness*
of an attesting witness, 877
of a deponent, 938
of a deceased declarant, 967

Interest on Money
reduced by subsequent oral agreement, 1938

Interest, statements against
party's admissions; *see* Admissions
hearsay exception; *see* Against Interest

Interlocutory proceedings, rules in, distinguished, 8

International affairs, privileged against disclosure, 1842
not judicially noticed, 2133

Interpretation
judge's function, 2110
opinion rule
expert interpretation of technical words, 1451
location of deed - descriptions, 1452

by parol evidence; *see* Parol Evidence Rule, D

Interpreter, qualifications of, 387
testimony to conversation with, 1280
proof of former testimony given through, 438

necessity for, 496
adequacy of cross-examination without, 927
admissions of, as agent, 687, 1280

Interpreter — *Continued*

sworn translation of deposition, 1187
translation as hearsay, 1281
must be sworn, 1281, 1285
juror as, 1405

communication between attorney and client, through, is privileged, 1796
Interrogation, mode of; *see* Question to a Witness; Examination

Interrogatory, mode of framing; *see* Question to a Witness

to opponent before trial; *see* Discovery
notice of deposition; *see* Deposition
order of topics; *see* Order of Examination

non-responsive answer to, 475, 925
sweeping interrogatory, 926
answers to statutory, 1587

Intimidation of witness, as evidence of guilt, 654

on cross-examination, forbidden, 468
Intoxication, as evidence of an act done, 168, 173

as affecting ability to do an act, 168

modes of evidencing, 265
evidenced by conduct, 265

by predisposing circumstances, 265
by prior or subsequent condition, 265

by appearance, 265, 404, 730
other instances, as evidencing a common drunkard, 232

as disqualifying a witness, 367
qualifications of witness testifying to, 387, 404

spouse testifying to, as confidential fact, 1813

confession made during, 715
of a witness, in impeachment, 525, 562, 570

presumption of incapacity for crime during, 2065

see also Intemperance; Liquor-selling; Negligence

Invalidating one's own instrument, forbidden, 377

Invention, privilege against disclosure of, 1837

see also Patent; Trade Secret

Irrelevancy of evidence, cured by offering other irrelevant evidence, 46

distinguished from multifariousness, 123

not the subject of privilege, 1694

Irrelevant matters conditionally received, 1360

Issue, facts not in, distinguished from facts not admissible, 3

parent's bastardizing of, 398, 1521

Issues, offering former testimony on the same, 919

of pedigree, to admit family hearsay, 996

INDEX OF TOPICS

[Numbers refer to sections §§]

Issues — Continued

proving character in; *see* Character;
Confusion of Issues

J

Jail; *see* Conviction of Crime; Imprisonment; Confession
Joint-Defendant, etc.; *see* Co-defendant, etc.
Journal; *see* Books of Account; Legislative Journal; Newspaper
Judge to determine qualifications of witness, 369, 393, 2101
to determine admissibility of a confession, 724
questions to a witness by a judge, 474, 2100
witness called by, may be impeached, 509, 515
testimony by a, 1270, 1404
privilege for, 1689
notes of testimony taken by, 1336
evidence offered after charge given by, 1367
power to determine privilege-claim, 1745, 1801, 1843
admissibility of evidence, 2101
negligence, 2104
reasonableness, 2107
malicious prosecution, 2107
construction of documents, 2110
criminal intent, 2113
foreign law, 2115
may seek evidence, 1990, 2126
may select and call expert, 1991
may not use private knowledge, 2126
may take judicial notice; *see* Judicial Notice
see also Judicial Discretion; Magistrate
Judgment of conviction of crime, as affecting a witness; *see* Conviction of Crime
offer to confess, as an admission, 642
theory of conclusiveness, 901
of conviction of crime, used against accessory, 921
sheriff's recital of contents, 1130
full faith and credit to be given to, 1160
proving the whole, 1570
see also Judicial Record
Judicial Admission, distinguished from other admissions, 637, 2140
of contents of a document, 807
of execution of a document, 1597
effect as conclusive upon the party making, 2141
exclusive of evidence by the party benefiting, 2143
validity as a waiver of unconstitutionality or other illegality, 2144
effect on subsequent trials, 2146
form and tenor of the admission; who is authorized, 2148

Judicial Admission — Continued

by attorney, 2148

Judicial Decision

report of, proved by official printed copy, 1164, 1622

by private printed copy, 1623

judicially noticed, 2134

Judicial Discretion, scope of, 49

abuse of, 49

distinguished from unappealable rulings, 49

ruling upon objections, 94

admitting experiments, etc., 349

determining a witness' qualifications, 368, 371, 381, 404

allowing leading questions, 455, 474

admitting a confession, 700, 724

controlling the scope of cross-examination, 533, 584

search for a lost document, 760

admitting testimony after the proper time, 1350, 1376

limiting the number of witnesses, 1401

relieving from stipulation, 2146

Judicial Notice, general theory, 2120

mode of proceeding, 2120

taken by jury, 2127

is not conclusive, 2120

must be requested, 2124

judge's private knowledge, 2126

judge may inform himself, 2126

specific facts noticed

domestic and foreign law, 2531

charter of city, 2531

State law, by Federal courts, 2532

affected by sub-division or amalgamation, 2532

international affairs; seal of State, 2533

official and judicial seals, 1631

almanac, 2581

foreign judgments, 2133

public divisions of land; boundaries, capitals, counties, etc., 2133

official authority and identity, 2133

elections, 2133

census, etc., 2133

proceedings of legislature, Executive proclamation, 2133

officers and rules of court, 2133

jurisdiction and terms of court, 2134

judicial proceedings, 2134

commerce, industry, history, science, etc., 2135

times, distances, 2135

meaning of words, 2135

intoxicating liquors, 2135

dictionaries, 2135

Judicial Record, what constitutes, 194

original admissible instead of a copy, 754

INDEX OF TOPICS

[Numbers refer to sections §§]

judicial Record — *Continued*
 custody presumes genuineness, 1630
 original need not be produced, 778, 801
 copy of, preferred to recollection, 821-826
 certified copy, 831
 copy of a copy, 832
 sealed attestation of copy, 1633
 conclusive proof of the facts adjudged, 901, 1946
 of contents of lost document re-established, 832, 1120, 1160
 full faith and credit required of, 1160
 answer in chancery; *see* Answer provable by certified copy, 1160
 whole must be proved, 1570, 1578
 see also Certified Copy
 urat, as evidence of oath taken, 1147
 see also Certificate of Oath; Public Document; Notary
 urisdiction, conviction of crime in another; *see* Conviction of Crime
 abseance from, as presuming death, 2084
 document out of, 776
 attesting witness out of, 872
 subpoena to witness out of, 1692
 juror, having knowledge must testify, 1267
 incompetency of, 1267
 not to receive evidence out of court, 1268
 as witness, 1405
 as interpreter, 1405
 personal knowledge of, 1947
 jurors, communications by and to, 1825
 motives, beliefs, misunderstandings, etc., 1947
 impeaching a verdict, 1947
 testimony supporting a verdict, 1947
 Jury, fraud in packing, evidence of intent, 314
 memorandum of recollection shown to, 441, 450
 determination of admissibility of confession, 724
 determination of admissibility of dying declaration, 964
 withdrawal during arguments of admissibility, 1277, 1320
 corporal injury exhibited to, 731, 1704
 clothing exhibited to, 731
 animal produced before, 730, 733
 improper sampling of liquor by, 732
 reading scientific books to, 1177
 verdict not to be impeached by juror, 1947
 deliberations of, 1947
 failure to observe formalities of conduct, 1947
 correction of mistake in verdict, 1947
 notes of former testimony taken by, 1139
 judicial notice by jury, 1267

Jury — *Continued*
 view by, evidence not to be received at, 1268
 defendant's presence at, 1269
 general rules for, 734
 information acquired at view by, is evidence, 1268
 evidence not ordinarily to be offered to, after retirement, 1361
 to be offered to, after verdict, 1367
 juror may be witness, 1405
 must be sworn, 1267
 charge given, 1367
 retirement of, 1361
 showing specimens of writing to, 1488
 privilege for communications between, 1825
 examining the jury before discharge, 1947
 misconduct of party or court-officer toward, 1947
 verdict of, given to unintended party, 1947
 manner of, and right in polling, 1947
 sufficient evidence for, 2002
 right to determine law, 2115, 2116
 to construe documents, 2110
 to determine intent, 2113
 negligence, 2104
 reasonableness, 2107
 admissibility of evidence, 11, 38, 2101
 right to use general knowledge, 2127
 see also Juror; Jurors; Bribery; Grand Jury; Judge; Verdict
 Justice of the Peace
 docket of, original required, 778
 certified copy allowed, 1160
 seal not presumed genuine, 1639
 examination of accused or witness; *see* Examination
 record conclusive, 1946
 office judicially noticed, 2133
 see also Public Officer; Judge

K

Kidnapping, other offences as evidence of intent, 308
 King, testimony of, admitted without calling, 918, 1145
 privilege of, 1849
 Knife; *see* Weapon
 Knowledge, technical, as showing ability to do an act, 168
 of poisons, 168
 of skill in imitating handwriting, 168
 and experience in drafting wills, 168
 Knowledge, or Belief
 (a) *In general*
 distinction between Knowledge and Belief, 403
 distinguished from Design and Intent, 297
 distinguished from Experience, 400

INDEX OF TOPICS

[Numbers refer to sections §§]

Knowledge — Continued

- (b) *Circumstances or Reputation, as evidence of*
 - of accused, as to deceased's aggression, 277
 - as to deceased's character, 278
 - of employer, as to employee's incompetence, 281
 - of owner, as to animal's vice, 283
 - precautions taken with animals to show, of vice, 647
 - of owner, as to defect of place or machine, 284
 - of purchaser, as to seller's insolvency, 285
 - of possessor, as to stolen goods, 286
 - of creditor or debtor, as to partnership, 287
 - of maker of representations, as to falsity, 285
 - of liquor-seller, as to buyer's condition, 285
 - of prosecutor or arrester, as to probable cause, 289
 - of utterer, as to forged paper, 289, 302
 - of possessor, as to contents, 289
 - about a document, production unnecessary, 795
 - of sundry persons, 277
 - specifying grounds of, on direct examination, 402
 - information or reputation, as *res gesta*, 1256
- (c) *Conduct, as evidence of*
 - of sundry facts known or believed, 290, 292
 - of consciousness of guilt, 650
 - of innocence, 294, 665
 - prima facie* evidence defined by statute, 906
- (d) *Declarations, as evidence of; see* Mental Condition, Declarations of
- (e) *Other crimes, as evidence of*
 - general theory, 298
 - sundry crimes (forgery, embezzlement, etc.), 302
 - see also* Intent
 - definition of, 297
- (f) *As a testimonial qualification*
 - often both general and specific, 414
 - burden of proof of, qualification, 401
 - questioning witness as to ground of, 402
 - degree, quality and source of, 400
 - judicial phrasing of principles of, 400
 - must not be founded on hearsay, 405
 - need not be positive or absolute, 403

Knowledge — Continued

- inference of identity from appearance, 404
- testimony to another's state of mind, 404
- speculative testimony to or personal injuries, 404
- testimony of non-occurrence from absence of person, 404
- testimony to a third person's
- (g) *Qualifications of a witness; see* Witness, I, *Qualifications*
- (h) *Impeachment of a witness; see* Impeachment

L

- Land, words during possession or as *res gesta*, 1246-1248
- public divisions of, judicially noted, 2133
- possession of, as evidenced in various ways; *see* Possession
- contracts or customs concerning; Contracts; Custom
- declarations or reputation about; Boundaries
- parties' admissions of title to; Admissions
- testimony to value of; *see* Value
- see also* Property; Premises
- Land-grant of government; *see* Decree
- Land-office
- Landlord, tenant disputing title of; Landmark; *see* Boundaries
- Land-office, producing original of documents in, 791
- conclusiveness of rulings of, 901
- records of, in general, 1119
- register of, to prove a deed's execution, 1110
- certificates of, 1145, 1155
- reports of title, 1130
- surveys of, 1133
- copy of whole required, 1569
- Language; *see* Interpreter; Interpretation
- Lapse of Time, as presuming lost document, 762
- as presuming payment, 205, 2068
- Larceny, possession of stolen goods as evidence of, 200, 2066
- possession of money, as evidence of, 201
- other crimes as evidence of intent, 308
- motive for, 325
- evidence of identity of goods, 334
- owner's complaint after, 627
- accused's explanations after, 1245
- notice to produce original document in, 768
- proof of, without producing document stolen, 801
- words accompanying the taking, as *res gesta*, 1246, 1250

INDEX OF TOPICS

[Numbers refer to sections §§]

oath — *Continued*
 testimony of owner to non-consent, 1544
 resumption from possession of goods, 2066
 latent Ambiguity in a document, 1978
 rules of, distinguished from fact, 3, 2100
 rules of, distinguished from rules of pleading and evidence, 3
 laymen testifying as experts on, 383
 foreign statute proved without copy, 829
 by expert, 383, 408, 1447
prima facie evidence of, under statute, 906
 proved by official printed copy, 1164, 1622
 by private printed copy, 1181, 1623
 by treatises, 1173
 presumption of, 2012
 judicially noticed, 2131, 2132
 judge or jury to determine, 2100, 2115
 laws, conflict of; *see* Conflict of Laws
 lawsuit; *see* Litigation
 leading Questions, what are, 462
 allowable only in discretion, 466
 kinds of questions that are leading, 463
 assuming a disputed fact as true, 463
 admitting of "yes" or "no" answer, 463
 answer of witness to, 463
 exceptions to the rule, 455
 on cross-examination, 464, 512
 for bias shown, may be forbidden in cross-examination, 464
 own witness hostile, biassed, or unwilling, 465
 facts preliminary to matters in issue, 465
 on extraordinary occasion, 455
 when witness' recollection is exhausted, 466
 when witness has immature or weak mind, 466
 misleading on cross-examination, 467
 judge may ask, 474
 impeaching one's own witness, 512
 in dying declarations, 957
 see also Question to a Witness
 Learned Treatises, used in evidence, 1170
 counsel reading from, 1177
 Lease, course of business as evidencing terms of, 171, 317
 ancient, to show seisin, 203
 production required, in proving tenancy, 799
 collateral parol agreement qualifying, 1935
 see also Deed; Possession
 Ledger, as a book of regular entries, 1023, 1032
 Legatee, admissions of, 688

Legislative Journal, whether original's production is required, 779
 whether receivable to overthrow enrolment of statute, 903
 admissible to prove facts recorded, 1124
 provable by printed copy, 1164, 1622
 judicially noticed, 2133
 Legislature, power of, to alter rules of evidence, 31, 906
 power to compel answer from witness, 1671, 1731
 privilege of member of, 1842
 see also Statute; Legislative Journal; Constitutional Rules
 Legitimacy, birth during marriage, as evidence of, 207
 resemblance of child, as evidence of, 209
 as evidenced by parents' conduct, 293
 by parents' statements; *see* Family History
 as evidenced by reputation, 1069
 presumption of, 2080
 see also Bastardy; Illegitimacy; Marriage
 Length of a witness' examination, 473
 of a trial, 1350
 Lessee, declarations of, made during possession, 1247, 1248
 see also Lease; Verbal Acts
 Letter, delivery of, as evidenced by mailing, 172
 anonymous typewritten, 1625
 third person's, as evidence of sanity, 252
 similar act of sending lewd, 314
 receipt of, as qualifying a witness to handwriting, 420
 failure to reply to, as an admission, 671
 found on accused is admissible, 671
 of husband or wife, showing feelings, 1212
 putting in other letters in answer, 1565, 1582
 received by mail in reply, as genuine, 1625
 admissions of sending or receiving, 1625
 receipt of, as evidence of authorship, 2069
 see also Document; Execution
 Letter-press copies, as originals, 784
 Lex fori, rule of evidence in, applicable, 17
 Liability, facts of civil liability as privileged, 1707
 of criminal liability as privileged, 1730
 Libel; *see* Defamation
 License to sell liquor, as evidence of sale, 267
 burden of proof of, 2066
 refusal to produce, as evidence of non-possession, 662
 to practise medicine, as qualifying a witness, 384

INDEX OF TOPICS

[Numbers refer to sections §§]

License — *Continued*
to marry; *see* Marriage
Lie; *see* Falsehood; Perjury
Lien, privilege for documents held under, 1695
Life, presumption of continuance of, 2084
of survivorship, 2084
expectation of, evidenced from long life of ancestors, 248
Life Insurance; *see* Insurance
Life Table, used in evidence, 1174
judicially noticed, 2120
Light, distance or quality of, as shown by instances, 354
Limitations; *see* Statute of Limitations
Line of survey; *see* Boundaries; Survey
Liquor, effect of, as indicating nature, 352
sample of, as indicating nature, 342
improperly used as sample by jurors, 732
selling to a minor; *see* Age
seized in illegal search, admissible, 1738
druggist required by statute to file report of sales of, 1738
burden to show license in illegal sale of, 2066
meaning of terms, judicially noticed, 2135
intemperate use of, not provable by reputation, 1078
see also Intoxication; Liquor-selling
Liquor-selling, possession of liquor, as evidence of, 200
other sales as evidence of common selling, 232
as evidenced by license or tax-payment, 267
to minor or intemperate, evidence of knowledge of, 285
other sales, as evidence of intent, 313
other keeping, as evidence of continuous keeping, 320
burden of proof of license for, 2066
privilege not to produce license for, 1842
inference from refusal to produce, 662
presumption from possession of liquor, 2066
see also Intoxication; Liquor
Liquor-tax receipts, disclosure of, 1842
List of witnesses, before trial, 1327
before grand jury, 1327
Literature, counsel's argument referring to, for illustration, 1273
Litigation, fact of, as biasing a witness, 536
pleadings in other, as admissions, 682
kind of, in pedigree hearsay, 996

Loan, words accompanying, as *gesta*, 1246
fact of, shown by possession of money, 169, 243
lack of money, as evidence of motive for, 326
see also Contract; Credit
Payment
Locomotive; *see* Machine; Speed
Log, marks on, as evidence of coast ship, 198, 1593
register of, 198, 1593
Log-book of ship, as a book of regular entries, 1005
as an official register, 1102
Logical theory of relevancy, 117
Longevity, evidenced by long life of ancestors, 248
Loss of a document; *see* Original Document
of a ship, as evidenced by lack of news, 205, 2084
Lost Document, substance of, 1566
contents of, 1453
provable by recollection; *see* Recollection
copy of lost ancient deed, 1614
copy of, judicially established, 901
proved by certified copy; *see* Certified Copy
of lost deed recited in another, 164
substance of contents of lost deed, 1453, 1566
presumption of, 2069
from lapse of time, 762
see also Original Document
Lost Grant, presumption of, 1566
not to excuse from proof of loss of specific deed, 762
Lottery, other acts as evidence of intent, 314
Lunacy, inquisition of, 1140
see also Lunatic; Sanity
Lunatic, knowledge of purchaser from as evidenced by repute, 285
disqualification of opponent as witness, 391
admissions of, 634
capacity to take the oath, 1290
to be a witness, 367
see also Sanity

M

Machine, evidencing owner's knowledge of danger of, 284
reputation of defect in a, 284
former injuries caused by defective, 284
repairs of, as evidence of negligence, 649
capacity of, as shown by its effects, 342-365
condition at another time or place, as evidence, 340

INDEX OF TOPICS

[Numbers refer to sections §§]

Machine — *Continued*

other instances of operation, as evidence of condition of, 350
 similar injuries, as evidence of defect in, 353
 similar precautions, as evidence of safety of, 355
 negligence presumed from accident at, 2062

see also Employee; Negligence

Machinery, injury from vibration of, 342

Magistrate, confession made to, 716
 report of, on statement of accused, 890, 902

report not taken, or lost, 890, 902

usable as memorandum, 890

as confession, 890

report of witness' testimony, 892

report of, showing incompleteness, 902

examination of accused or witness;

see Examination

see also Public Officer

Magnifying-lens, used by witness or jury, 483, 730

Mail, course of, as evidence of an addressed letter's delivery, 172
 of a reply-letter's genuineness, 1625, 2069

fraud in, other acts as evidencing intent, 307

proof of loss of letter sent by, 766, 767

see also Letter; Postmark

Maker, parol agreement collateral to instrument, 1934a

proving signature of, or attesting witness, 883, 887

see also Bill of Exchange; Note

Malice, as evidenced by an accused's threats, 178

by other assaults, etc., 312

by hostile expressions or conduct, 329

by other utterances in defamation, 331

unproved plea of justification as evidencing, 331

as impeaching a witness; *see* Bias

presumption of, in criminal cases, 2064

see also Malicious Mischief;

Malicious Prosecution; In-

tent; Motive

Malicious Mischief, evidence of intent in, 314

Malicious Prosecution

character of plaintiff, as mitigating damages, 156, 239

evidence of prosecutor's belief, 289

conduct as showing malice, 329

former testimony in, 942

testimony before grand jury, not privileged, 1836

burden of proof in, 2095

judge or jury to determine probable cause, 2107

Malpractice, character of defendant in, 150

other persons' conduct, as standard of care, etc., 355

party's skill proved by reputation, 1078

by particular instances of its exercise, 238

by opinion, 1470

privilege for communications to physician, 1860, 1866

see also Negligence; Abortion;

Homicide

Map, used to illustrate testimony, 480

verification of, 481

as an official survey, 1133

as a declaration of boundary, 1039

as reputation of boundary, 1060

see also Boundaries; Survey

Marital Relationship

I. *Disqualification of husband or wife as witness for the other*

II. *Privilege not to be witness against the other*

III. *Privilege for communications*

I. *Disqualification of husband or wife as witness for the other*

general principle, 396

exceptions to the rule, 396

impeachment of witness by, 536

bastardizing the issue, 398, 1521

II. *Privilege not to be witness against the other*

general principle, 1710

marriage after process begun, 1711

paramour, 1711

bigamist, 1711

disputed marriage, 1711

agent's admissions, 1713

production of documents, 1713

testimony obtained by information gained from the wife, 1713

what testimony is prohibited

husband or wife not a party, 1715

bankruptcy, 1715

pauper-settlement, 1715

adultery, etc., 1715

co-indictee, co-defendant, 1717

person deceased or divorced, 1712

exceptions by necessity (abduction, abortion, adultery, assault and battery, divorce, incest, injury to property, poisoning, rape), 1723

exceptions by statute: separate estate, 1718

agency, 1718

whose is the privilege, 1724

waiver, 1725

inference from claiming it, 1726

privilege inoperative unless claimed, 1726

III. *Privilege for communications*

general principle, 1812

INDEX OF TOPICS

[Numbers refer to sections §§]

Marital Relationship — *Continued*
 distinction between privilege and disqualification, 1812
 confidence to be judged from circumstances, 1813
 communications but not acts privileged, 1816
 third persons overhearing, 1818
 communicative documents in possession of third person, 1818
 who may claim; waiver, 1822
 death and divorce, 1820
 separation or unlawful cohabitation, 1820
see also Husband; Wife; Marriage; Divorce; Legitimacy

Mark, illiterate's signature by; *see* Illiterate

on logs, as evidence, 198, 1593
 register of, 198, 1593

Market Reports, admissible in evidence, 1182

Market Value; *see* Value

Marksman; *see* Illiterate

Marriage, breach of promise of; *see* Breach of Promise

birth during, as evidence of legitimacy, 207
 prior coverture, as evidence, 320
 certificate of, as evidence, 293, 1106
 habit and repute, as evidence, 293, 1537
 reputation, as evidence, 1066, 1537
 utterances of the parties as *res gestæ*, 1242
 proof of marriage in fact, 1537
 meaning of "marriage in fact," 1537
 conduct as evidencing prior consent, 1537
 authentication of certificate of, 1630
 admissions, 1582
 register of, as evidence; *see* Register of Marriage, Birth, and Death
 contracted in jest, 1896
 statement concerning, as hearsay; *see* Family History
 presumption of consent, 2055
 of capacity, 2059
 of legitimacy, 2080
 of coercion, 2065
 of identity, 2082
 valid, presumed in bigamy, 2059
 husband or wife privileged by; *see* Marital Relationship

privileged communications in; *see* Marital Relationship
see also Foreign Law; Legitimacy; Husband; Wife; Certificate

Married Woman; *see* Marital Relationship; Wife; Bastardy; Marriage

Master; *see* Employer

Materiality, distinguished from admissibility, 3

Mayhem, ascertained by inspection, 730

Meaning; *see* Interpretation

Means of action, as evidence of act done, 167

Measures, false, other acts evidencing intent, 307

Medical Books, used in evidence, 11

Medical Matters, witness' experience or knowledge as qualifying him, 384, 408
 knowledge based on study of books, 408
see also Physician; Expert Witness; Opinion Rule

Medical Treatment, whether, is proved as evidenced by acts of other persons, 355
see also Malpractice; Physician's Skill

Medicine, similar acts of unlawful prescription, 314
 license to practise, as qualifying witness, 384

Member of Congress; *see* Congress

Memorandum to aid recollection; *see* Recollection

Memory, belief or impression as showing sufficient, 428
 modes of refreshing or aiding; *see* Recollection
 discrediting a witness by his lack of memory; *see* Impeachment

Mental Capacity, to do an act, 168
see also Sanity; Will

Mental Condition,
see Sanity; Intent; Malice; Motive; Knowledge; Insane Belief; Insanity

Mental Condition, Declarations of
 (a) *Pain and Suffering*
 to a physician or layman, 1202
 to a physician, discriminated, 1202
 after litigation begun, 1205
 past events, 1203
 failure to complain, as evidence, 1203
 (b) *Design, Intent, Motive, etc.*
 design or plan to act, 1208
 intent in domicil, 1209
 intent in bankruptcy, 1210
 motive or reason, 1211
 alarm, affection, bias, disgust, emotion, fear, malice, 1212
 accused person's statements, 1213
 (c) *Testator*
 ante-testamentary statements of intent, 1219
 post-testamentary statements of contents, etc., 1220
 intent to revoke, 1221
 undue influence or fraud, 1222
 intelligence or sanity, 1224
 (d) *Sundries,* 1257
 exception to the Hearsay rule, 1206
 see also Knowledge; Intent; Malice; Motive; Sanity

Microscope, used by witness or jury, 483, 730

INDEX OF TOPICS

[Numbers refer to sections §§]

idwife as a witness; *see* Expert Witness; Opinion Rule
 ilitary records, as evidence, 1102
 privilege against disclosure of secrets, 1842
 ill; *see* Machine; Sparks
 ind, testimony to state of another's, 404
 line, inspection of, 1339, 1343
 see also Premises
 inister Plenipotentiary; *see* Ambassador
 inister of Religion; *see* Priest
 inor; *see* Child; Liquor-selling; Age
 inutes of clerk of court; *see* Judicial Record
 miscarriage; *see* Abortion; Personal Injury
 misconduct of a juror, 1947
 Mistake, proof of, by parol evidence;
 see Parol Evidence Rule
 names inserted or omitted by, 1911
 in signing bill of exchange, 1898
 by circumstantial evidence; *see* Intent
 Mistress; *see* Paramour
 Mitigation of Damages; *see* Damages
 Mob, violence by, other acts as evidencing intent, 314, 1257
 as excluding a confession, 707
 Model, used to illustrate testimony, 480
 verification of, 481
 Money, possession of, as evidence of loan or payment, 169, 243
 as evidence of larceny, 201
 offer of, to injured party, to settle, 642, 654
 to witness, as a bribe, 540
 lack of, as evidence of motive, 326
 experience of expert to quality of, 385
 evidence of counterfeiting; *see* Counterfeiting
 testimony to genuineness of; *see* Paper Money; Handwriting
 receipt of, as impeaching a witness; *see* Corruption
 payment of, mode of proving; *see* Payment
 see also Value
 Morphine, use of, as disqualifying a witness, 367
 as impeaching a witness, 526
 Mortality Table, used in evidence, 1174
 judicially noticed, 2120
 Mortgage, other transactions as evidence of debtor's intent; *see* Fraud; Fraudulent Transfers; False Representations
 agreement to hold deed as, shown by parol, 1933
 admissions of mortgagor or mortgagee, 692, 1249
 production of original; *see* Original Document
 see also Deed; Sale

Mother, statements of, to evidence pedigree; *see* Family History
 insanity of, as evidence, 263
 testimony to bastardy, 398, 1521
 see also Legitimacy; Bastardy
 Motion, for a nonsuit or verdict, 2006
 to exclude all evidence, 2006
 to strike out, 82
 to produce documents, on trial; *see* Original Document
 before trial; *see* Discovery
 see also Objection
 Motive
 In general
 as evidence of an act, 185, 322
 1. Circumstances creating a motive
 general principle, 324
 motive for murder, 325
 motive for other acts and crimes, 325
 pecuniary circumstances as a motive, 201, 326
 2. Conduct exhibiting a motive
 in general, 327
 3. Prior and subsequent motive
 hostility, 311
 sexual passion, 330
 malice in defamation, 331
 4. Sundries
 necessity of showing, to establish crime, 187
 existence of affection as negating, in homicide, 187
 as a fact in issue, 185
 third person's motive, to evidence accused's innocence, 194
 testifying to another person's motive, 404
 to one's own motive, 392
 proof by opinion testimony, 1457
 by declarations; *see* Mental Condition, Declarations of
 by reputation or information; *see* Knowledge
 Multiple admissibility, 42
 Municipal Corporation; *see* Corporation; Public Document
 ordinance or charter of, judicially noticed, 2131
 Murder; *see* Homicide
 Mutual Mistake, under parol evidence rule, 1906
 clear proof of, 2027

N

Name, as evidence of identity, 293, 334
 falsity or non-existence of person evidenced by failure to find, 205
 use of false, as evidence of guilt, 652
 testimony to knowledge of, 411
 identity of, as raising presumption, 2082
 Narrative, in *res gesta*, 1233

INDEX OF TOPICS

[Numbers refer to sections §§]

Narrative — Continued

for statements of pain, 1203
 Nationality, as evidenced by corporal traits, 210
 as disqualifying a witness, 374
 Naturalization, statutes requiring citizens' testimony in, 1523, 1534
 Naval register, as evidence, 1102
 Necessity, opinion testimony to, 1455
 Negative instances, as evidencing cause or condition, 348
 observation, as showing that a thing did not occur, 413
 Negligence, character for, to evidence an act, 148
 character for, as in issue, 161
 habit of, as evidence, 170, 174
 particular acts, as evidence of character, 228, 238
 unfair surprise in showing acts of, 228
 employee's acts and repute, as evidencing employer's knowledge, 281, 282
 evidenced by insurance against accident, 648, 536, 548
 subsequent repairs to evidence, 649
 other instances as evidence of habit of, 316
 defects of apparatus as evidence of, 342
 regulations of railroad as measure of, 355
 other spark-emissions, as evidence of a defective locomotive, 351
 other persons' conduct, as evidencing a standard, 355
 constitutionality of statute making liable without negligence, 906
 making *prima facie* evidence of negligence, 906
 proved by reputation, 1078
 by opinion evidence, of conduct, 1445
 of character, 1470
 presumption of, 2060
 contributory, 2060
 loss by bailee, carrier, 2061
 defective apparatus, 2062
 in injury to employee, 2062
 death by violence, 2063
 judge or jury to determine, 2104
 jury may use general knowledge to determine, 2127
 in medical treatment; *see* Physician
see also Repairs
 Negotiable Instrument, admissions as applied to, 695
 raising presumption of consideration, 2069
see also Bill of Exchange; Note; Payment; Parol Evidence Rule
 Negro; *see* Race
 Newspaper, notice in, as evidencing knowledge, 287
 quotations of prices, as evidence of value, 425, 1182

Newspaper — Continued

affidavit of publication of notice a, 1187
 communications to, not privileged, 1762
see also Printed Matter
 New Trial, motion for, as confirming an exception, 97
 error of ruling as ground for, 102
 whether required for omission of oath, 1300
 granted for withholding evidence, 660
 validity on, of former judicial admission, 3146
 Night, evidence of power of vision a, 354
 Noise; *see* Sound
 Nolo Contendere as an admission, 681
 Non-access, as evidence of illegitimacy, 192, 193
 parent's testimony to, 398, 1521
see also Bastardy
 Non-occurrence of an event as shown by failure to see or hear, 205
 Non-suit, motion for a, 2006
 Notary, using an entry to aid recollection; *see* Recollection
 habit of, mailing notice of protest, 171
 record of protest, producing the original of, 791
 whether conclusive, 905
 regular entries of transactions by; *see* Regular Entries
 personal knowledge required, 1097
 certificate of protest, 1145
 of deed-acknowledgment, 1147
 seal presumed genuine, 1640
 power to compel testimony, 1671
see also Public Officer
 Note or memorandum, of testimony; *see* Former Testimony
 of stenographer, attorney, jurymen as official statements, 1139
 of a transaction, used to aid recollection; *see* Recollection
 Note, Promissory, forgery of; *see* Forgery
 payment of; *see* Payment
 agent's authority to make; *see* Agency
 impeaching one's own, 377
 presumption of title from possession of, 2067
 of payment, 2068
 admissions of assignor, indorser, etc., 695
 production of original; *see* Original Document
 indorsement on, as statement against interest, 970, 975
 protest of, as evidence, 1146
 signed by mistake, 1898
 delivery in escrow, shown by parol, 1892, 1908
 collateral agreement, shown by parol, 1934a

INDEX OF TOPICS

[Numbers refer to sections §§]

Notice (a state of mind); *see* Knowledge

Notice (a communication)

(a) *to produce a document*

- as permitting use of copy
 - notice to opponent, 767
 - when not necessary, 767
 - when sufficient, 770
 - stolen original document, 768
 - exceptions to the rule, 767
 - procedure of giving notice, 769
 - to agent, 769
 - notice to third person, 775
- as compelling opponent's production of original, 1703
- as obtaining discovery before trial, 1335

(b) *to fix liability for dishonor of bill*
evidenced by mailing, 172

(c) *to quit*, as an admission of tenancy, 668

(d) *to take deposition*, 916

(e) *sundries*
publication of, proved by affidavit, 1187

giving of, as *res gestæ*, 1242, 1256
see also Original Document

Novation, shown by parol, 1938

Nuisance, provable by other instances, 350

railroad as, 350
amount of business to evidence, 356
provable by reputation, 1078
by noise, reproduced with phonograph, 483

Nul Tiel Record, original required in, 778

Number of witnesses; *see* Witnesses, VII

Nuncupative Will, proved by two witnesses, 1510

Nurse, as a witness; *see* Expert Witness; Opinion Rule

O

Oath

1. *As a security against falsehood*
theory, 1286

kind of belief, 1287

form of oath, 1295

time of administration and of objection, 1300

if omitted, whether new trial required, 1300

capacity

mode of ascertaining, 1292

infants, 1289

lunatics, idiots, 1290

persons subjected to, 1285

whether a witness merely sworn is impeachable, 1378

abolition or dispensation, 1302

statement out of court under oath, excluded, 910

Oath — *Continued*

2. *Sundries*

confession made on examination under, 716

belief on, by witness to character, 1471

Objection to evidence, time and form of, 71

as immaterial, incompetent, and irrelevant, 83

general, if overruled may not avail, 83

specific, if overruled will be effective to an extent, 83

how waived, 90

see also Waiver

ruling upon an, 94

distinguished from exception, 97

to witness' qualifications, 72, 365, 393

by party, claiming privilege for witness, 1673, 1743

renewal of, at close of case, 2015

ruling on an, must be immediate and final, 94

to deposition; *see* Deposition

Obligor, impeaching his own obligation, 377

admissions of co-obligor, 687

Obscenity of pictures, standard of, 355

see also Indecent Evidence

Observation, capacity of, 367

discredited by defective sight, 526, 562

Occupancy, evidenced by assessor's books, 1101

Offence; *see* Crime

Offender, habitual; *see* Habitual Criminal; Common Offender

Offer of evidence, form and tenor, 55

time to make, 59, 1345

improper statements of counsel in, 1272

after argument begun, 1367

to compromise, as an admission, 642

Office, presumption of title to, 1635, 2089

holding, evidenced from prior incumbency, 320

of duty performed in, 2088

Office Copy; *see* Certified Copy

Officer, public; *see* Public Officer

of a corporation, testifying on the faith of records, 406

see also Corporation

Official; *see* Public Officer

Official Certificate, contradicting one's own, 377

Official Communications, privilege for, 1842

see also State

Official Gazette, as evidence of a law, 1162, 1622

Official Record; *see* Public Document

Official Signature to document, not of attesting witness, 853

Official Statements; *see* Public Document

INDEX OF TOPICS

[Numbers refer to sections §§]

- Omission, to speak or claim, as a self-contradiction, 588
 - as an admission, 668, 670
 - of child by testator intentionally, 1982
- Opening Statement, not evidenced afterwards, 1277
- Opinion of value, as based on other sales, 357
 - stating the grounds of, by an expert, 381
 - knowledge, as distinguished from, 403
 - as sufficient in point of memory, 428
- hypothetical question; *see* Hypothetical Question
- as evidence of handwriting; *see* Handwriting
- impeachment by inconsistent, 587
- statements of political views, 1213
- by ordinary witness, 1410
- admissible when preceded by facts, 1410
- as to value of services, personal injuries, breach of contract, 1435
- as to care, moral character, professional skill, reasonableness, safety, etc., 1445
- religious, privilege for, 1699
- political, privilege for, 1700
- judicial; *see* Judicial Decision
- see also* Expert Witness; Opinion Rule
- Opinion Rule
 - (a) *in general*
 - competency of ordinary witness to give opinion, 1410
 - theory, 1410
 - practical tests, 1410
 - hypothetical questions, 1416
 - (b) *rule applied to specific topics*
 - insanity, 1430
 - value and damages, 1435
 - insurance risk, 1440
 - care, safety, prudence, duty, skill, or propriety of human conduct or a place, machine, or apparatus, 1445
 - (c) *law*
 - foreign law, 1447
 - trade usage, 1450
 - technical words in documents, 1451
 - location of deed-descriptions, 1452
 - contents of a lost document, 1453
 - testator's, accused's or grantor's capacity, 1454
 - solvency, possession, ownership, necessity, authority, etc., 1455
 - (d) *state of mind*
 - intent, motive, purpose, in general, 1458
 - meaning of a conversation, etc., 1969, 1459
 - impression or understanding, 1970, 1971, 1459

- Opinion Rule — *Continued*
 - (e) *sundry topics*
 - corporal appearances, 1461
 - medical and surgical matters, 1462
 - probability and possibility, 1463
 - capacity and tendency, 1463
 - cause and effect, 1463
 - distance, time, speed, size, weight, direction, form, identity, 1464
 - rule enforced for dying declarations, 961
 - (f) *character*
 - moral, of a defendant, 1469
 - of a witness, 1471
 - care, competence, or skill, 1471
 - (g) *handwriting*; *see* Handwriting
- Opium, use of, as disqualifying a witness, 367
 - as impeaching a witness, 526
 - 570
- Opponent, called as witness, whether he may be impeached, 513
 - destruction of a document by, 768, 767
 - deposition of, when absent, 942
 - taking, but not using a witness deposition, 921
 - see also* Admissions; Defendant Parties
- Opportunity in general, as evidence of a crime or other act, 188
 - exclusive, to do an act, 188
 - equal, for others, 190
- Oral admission of a party; *see* Admissions
- Order of topics of testimony; *see* Examination, III
- Ordinance, judicial notice of, 2131
 - certified copy of, 1152
 - printed copy of, 1164, 1622
- Original Document
 - (a) *in general*
 - general principle, 749
 - uninscribed chattels, 748
 - inscribed chattels, 749
 - all kinds of writings, 750
 - books of account or regular entry, 1015, 1032
 - what is production, 751
 - opponent's refusal to produce, as evidence of genuineness, 861
 - original always usable, 754
 - proving execution also, 754, 1601
 - order of proof between execution, loss, and contents, 758
 - copy also offered, 755
 - in larceny, 768
 - (b) *excuses for not producing*
 - loss or destruction, 759
 - sufficiency of search for, 760
 - proof of loss, by opponent's admission, 762
 - proof of loss established by record of judgment, 762
 - fraudulent suppression by opponent, 767, 772
 - larceny of, 762, 765, 767

INDEX OF TOPICS

[Numbers refer to sections §§]

Original Document — *Continued*

- intentional destruction by proponent, presumed contents, 662, 763
- detention by opponent; notice to produce, 764
- control of, is possession, 765
- out of jurisdiction may still be in possession, 767
- transfer of possession, 765
- mode of proving possession, 766
- possession of document sent by mail, 767
- notice in general, 767
- notice to third person, 769
- both notice and possession must be shown, 767
- rule of notice not applicable, 767
- rule of notice satisfied, 770
- document in court, instant demand, 770
- notice by implication, 768
- notice unnecessary at subsequent trial, 768
- subject to privilege against self-crimination, 767
- waiver of notice to produce, 767
- notice to agent, 769
- who should give notice, 769
- time of giving notice, 769
- attorney's possession as privileged, 1783
- party notified, out of jurisdiction, 769
- tenor and form of notice, 769
- consequences of non-production, 773
- inference from non-production, 773
- possession by third person, 774
- person not compellable to produce, 775
- fraudulent retention by third person, 775
- subpoena *duces tecum*, 775
- possession by proponent's co-party, 775
- foreign public document, 776
- irremovable documents, 777
- judicial records (pleadings, wills, etc.), 778
- other official documents, 779
- made by private person and filed in public office, 779
- corporation books, 780
- marriage records, etc., 780
- books of banks, abstracts, etc., 780
- of regular entry, 1015, 1032
- recorded conveyances, 781
- voluminous records, accounts, etc., 782
- absence of entries, 883
- (c) *what is the original*
may mean a copy, 783
- duplicates and counterparts, 784
- printed matter, 784, 791
- copy acted on as original, 790

Original Document — *Continued*

- account stated, 790
- telegraphic dispatches, 791
- wills, land-grants, mining rights, tax-lists, ballots, 791
- records, 792
- accounts, etc., 792
- memorandum to aid recollection, 436, 447
- handwriting shown by photograph, 484
- ledger and day book, 1032
- (d) *not applicable where contents are not in issue*
document read aloud, etc., 794
- knowledge or belief about, 795
- identity or effect of a document, 796
- payment, receipts, 797
- ownership, tenancy, sale, gift, 799
- execution, delivery, publication, 800
- conversion, forgery, larceny, agency, etc., 801
- miscellaneous instances, 801
- dying declarations, 963
- pedigree statements, 997
- (e) *exceptions to the rule*
stolen document, 801
- collateral facts, 806
- opponent's admission of contents, 692, 807
- deed-recitals, disclaimer of title, 807
- witness' admission on *voir dire*, 811
- witness' admission on cross-examination, 812
- self-contradictory document, 812
- prior statements in depositions, 812
- record of conviction, 828
- foreign statute, 829
- (f) *rules for proof of copy*
copy preferred to recollection, 822, 826
- preferable kinds of recollection, 829
- preference for examined or sworn copy, 831
- copy of a copy, 832
- personal knowledge of correctness, 823
- loss proved by affidavit, 1186
- whole must be copied, 1566
- proof of lost will, 1513
- of lost ancient deed, 1614
- see also Copy; Certified Copy*
- Other Offences; *see* Similar Acts
- Overruling an objection, 71
- Overt Act; *see* Homicide; Treason
- Owner of an animal, mode of evidencing knowledge, 283
- of a dangerous place or machine, mode of evidencing knowledge, 284
- admissions by; *see* Admissions

INDEX OF TOPICS

[Numbers refer to sections §§]

Parties — Continued

to prove an act
in criminal cases, 131
in civil cases, 142
in issue, 155
to mitigate damages, 155
conduct of, to evidence character,
219
to evidence consciousness of
weak case, 664
failure to testify or produce evi-
dence, 657
disqualification as witnesses, 390
testifying to their own intent, 392
admissions by; *see* Admissions
books of account of; *see* Books of
Account
agent or kinsman of, not to take
deposition, 491
impeachment of their own witness;
see Impeachment
whether impeachable, when testifi-
ing for themselves, 502
when called by the opponent, 513
opponent as witness, treated as if on
cross-examination, 1372
exhibiting injuries to jury, 731
affidavit of, to lost document, 762,
781, 1186
former testimony of same, 919
books of account kept by; *see* Regu-
lar Entries
exclusion from court during testi-
mony, 1318
disclosure of documents or testimony
before trial; *see* Discovery
testifying first on their own side,
1353
answer to interrogatories, as evi-
dence, 1587
claiming privilege for witness, 1673
privileged not to testify, 1702
discovery; statutes, 1702
production of documents,
1703
premises, chattels, bodily
exposure, 1704, 1705
parol evidence rule, restricted to,
1939
understanding of, to affect a docu-
ment; *see* Parol Evidence Rule
burden of proof upon; *see* Burden
of Proof
Partner, admissions of, 687
Partnership, knowledge of, as evi-
denced by repute, 287
books of, as evidence, 674
admissions made after dissolution,
687
evidence of subsequent, by prior,
320
proof of, without producing instru-
ment, 801, 807
provable by reputation, 1086
Passengers, behavior of, as evidence
of danger, 355

Past Fact as "narrative," 1233
Pastor; *see* Clergyman
Patent Ambiguity in a document, 187
Patent of Invention, producing original
of assignment, 781
execution of assignment of, pro-
by record, 1117
inspection of machine before trial,
733, 1339, 1343
infringement of, privilege for trial
secret, 1696
Patent of Land; *see* Deed; Land-off
Paternity, other intercourse as evi-
dence of, 191
child's resemblance, as evidence of
209, 730
see also Bastardy; Non-access
Patient, physician's testimony to
ness of, 409
expressions of pain by, 1201
privilege for communications to
physician, 1855
Payee, parol agreement of, collateral
to instrument, 1934a
see also Bill of Exchange; Non-
Payment, possession of money, as evi-
dence of, 169, 243
possession of instrument, as evi-
dence of, 202
offer of, as an admission, 642
production of receipt for, 798, 806
indorsements of, as statements
against interest, 972, 975
books of account as evidence of,
1020
words accompanying, as *res geste*
1246
agreement as to mode of, shown by
parol, 1932, 1934a
presumption of, 2068
lapse of time as evidence of, 205
see also Contract; Money
Pecuniary Condition as evidence of
ability to make loan, 243
as evidence of motive, 326
Pedigree, hearsay statements of; *see*
Family History
statement in deposition to evidence,
992
of an animal, proved by reputation,
1078
by registry, 1180
inquisition of, by the heralds, 1130
see also Animal
Penalty, privilege not to disclose, 1732
Penitent, privilege for communications
to priest, 1870
Performance of official duty, pre-
sumed, 2088
of contract, burden of proof of,
2093
Perjury, other falsities, as evidencing
intent in, 307
confession of, as disqualifying a wit-
ness, 377
as impeaching a witness, 541

INDEX OF TOPICS

[Numbers refer to sections §§]

Jury — Continued

attempt at subornation of, 542
 producing original of chancery answer in, 778
 penalty for, as a requirement, 1310
 in deposition, 1311
 two-witness rule, 1504
 does not apply to act of swearing or words, 1504
 subornation of, one witness rule not applied, 1504
 testimony before grand jury, not privileged, 1836
 who is an accomplice in subornation of, 1517
 committed in disclosure for amnesty, 1754
 see also Falsehood
 perpetuam memoriam; *see* Deposition
 person; *see* Name
 person in Authority; *see* Confession of Crime
 personal Injury; *see* Corporal Injury
 pharmacist, privileged communications to, 1857
 required by statute to file reports of sales of liquor, 1738
 Phonograph used to reproduce nuisance created by noise, 483
 Photograph of a person, as used to identify him, 404, 480
 used by a witness to illustrate testimony, 480, 1485
 witness using, need not be maker of, 482
 verification of, 481
 objection to use of, 480
 X-ray, 483
 enlarged, 484
 of handwriting, 484, 1485
 process judicially noticed, 2120
 Physical traits to show race or nationality, 210
 inconvenience of production of evidence, 733
 traits, to evidence strength; *see* Power
 Physician, character of, as defendant in malpractice, 150
 conduct, as evidencing negligence or incompetence of, 228, 229, 238
 mode of treatment by another, as a standard of care, 355
 qualified to be an expert witness, 384, 408
 license to practise, as qualifying an expert, 384
 testimony of, to possible developments in corporal injury, 404
 acquaintance with person insane or diseased, 416
 hypothetical question to; *see* Hypothetical Question
 witness to value of services of, 424
 patient's expressions of pain to, 1201
 character for skill, 1407

Physician — Continued

amount of fee demandable as expert, 1682
 privileged not to attend court, 1690
 inspection of injured person by, 1704
 privilege for patient's communications to, 1855
 privilege of, as attesting witness, 1866
 see also Malpractice; Opinion Rule; Poison; Physician and Patient
 Physician and Patient, privileged communications, 1855
 burden of proof of confidence, 1856
 third person hearing, 1856
 must be in professional character, 1857
 consultation of physicians, 1857
 patient's belief of matters necessary to treatment, 1858
 communication may be by exhibition, 1859
 insanity observed, 1859
 privilege limited to tenor of communication, 1859
 no application to partaker in crime, 1860
 request to commit crime, 1860
 privilege is patient's, 1861
 patient need not be party, 1861
 inference from claim, 1861
 claimed by representative of deceased, 1861
 death does not terminate privilege, 1863
 may be waived, 1864
 waiver in insurance policy, 1864
 by conduct, 1866
 by testifying, 1866
 by calling physician as witness, 1866
 by personal representative, 1867
 see also Physician
 Picture, of a person or place, to illustrate testimony, 480
 see also Photograph; X-ray
 Pier; *see* Premises
 Piracy; *see* Robbery; Copyright
 Pistol; *see* Weapon
 Place, condition in one, evidencing that in another, 340, 342
 value at another, as evidence of value, 357
 character of a witness at another, 522, 1074
 of birth, death, etc., as evidenced by family hearsay, 995
 judicially noticed, 2133, 2135
 see also Premises
 Plaintiff, character of, as evidence, 142-150
 character of, as in issue or as mitigating damages, 155-161
 mode of evidencing character by conduct, 219-239
 see also Parties

INDEX OF TOPICS

[Numbers refer to sections §§]

- Plan, used to illustrate testimony, 480
see also Design; Survey
 Plat, used to illustrate testimony, 480
see also Survey
 Platform; *see* Premises
 Plea of truth as evidence of malice;
see Defamation
 as admission, 683
 Pleading, distinguished from evidence, 3
 from judicial admission, 2140
 as a party's admission, 681
 original in court records not pro-
 duced, 778
 statement in, to evidence pedigree,
 992
see also Judicial Record
 Pledge; *see* Mortgage
 Poison, evidence to show knowledge
 of, 168
 possession of, as indicating criminal
 design, 267
 similar acts to show intent in ad-
 ministration of, 312
 nature of, as shown by samples,
 342
 symptoms, as indicating nature of,
 352
 witness' experience as qualifying
 him, 384
 statements while eating poisoned
 lunch, 1233
see also Homicide
 Poles, telegraph or telephone; *see*
 Negligence; Highway
 Police-officer obtaining a confession;
see Confession
 Policy of insurance; *see* Insurance
 Poll-book; *see* Election
 Population as evidenced by census,
 1143
 judicially noticed, 2133
 Possession of tools, as evidence of a
 crime, 168, 267
 of chattels to evidence crime, 200,
 267
 of money, as evidence of loan or
 payment, 169, 243
 as evidence of larceny, 201, 2066
 as evidence of motive for crime,
 etc., 326
 of a document, as evidence of knowl-
 edge, 289
 as an admission, 671
 by opponent, as excusing non-
 production, 764
 of receipts, etc., as evidence of
 payment, 202
 of deed, to evidence delivery and
 execution of it, 203
 of land, continued after mortgage or
 sale as showing intent to defraud
 creditors, 205
 under ancient document as evi-
 dencing genuineness, 1613
 as evidenced by ancient docu-
 ment, 203
 Possession — *Continued*
 of forged documents, as evidence
 intent, 302
 of stolen goods, as evidence of larceny,
 etc., 200, 205
 other possession, as evidence
 intent, 304
 accused's explanations, 1245
 presumption from, 2066
 possessor's declarations of fact
 against interest, 969
 assessment-books as evidence
 1101
 statements about boundary, by a
 possessor; *see* Boundaries
 reputation about, 1054
 opinion testimony to, 1455
 by grantor, raising presumption
 fraud in sale, 2048
 presumption of ownership from, 1101
 of payment from, of receipt,
 2068
 of continuance of, 320, 2083
 of original document; *see* Original
 Document
 Adverse Possession
 ancient documents, as evidence
 of, 203
 knowledge of claim, as evidenced
 by repute, 286
 possession of part, as evidence
 ing possession of whole, 318
 under deed as evidence of
 boundaries, 318
 oral admissions of title, 807
 statements made during, as *res gestae*, 1247
 as affecting presumption of
 ownership, 1249
see also Document; Deed
 Possibility of doing or happening, as
 evidenced by instances, 346
 Posting in the mail; *see* Mail; Post-
 mark
 on a wall or fence, original not re-
 quired, 777
 Postmark, as evidence, 199
 presuming genuineness of, 1624
 as an official statement, 1145
 Poverty, as evidence of non-payment,
 169
 as negating probability of loan,
 169, 243
 as evidence of motive for a crime
 or transaction, 326
 evidenced by assessor's books, 1101
 Power, physical, as evidence of an act,
 168
 instances of physical, as evidence,
 241
 Power of Attorney; *see* Agency
 Power of Legislature, to make rules of
 evidence, 31
 Preamble of statute; *see* Recital
 Precautions to remedy or prevent in-
 jury, 355, 647

INDEX OF TOPICS

[Numbers refer to sections §§]

Preferential Rules defined, 745
 Pregnancy, events in, as evidenced by
 birthmark, 208
 admissible to show intercourse in
 rape, seduction, etc., 208
 see also Bastardy
 Prejudice, undue,
 by showing particular criminal acts,
 218
 acts of negligence in civil cases,
 228
 of unchastity, 229
 of employee or physician in
 negligence, 238
 not applicable to conduct to show
 character in issue, 231
 in circumstantial evidence, 1390
 Premises, owner's knowledge of de-
 fect, evidenced by prior condition
 or injury, 284
 leased for gaming, proved by repute,
 286
 repairs, as evidence of negligence,
 649
 condition at another time or place,
 as evidence, 340
 instances of condition or quality, as
 evidence, 350
 marks on, as evidence of identity,
 336
 similar injuries, as evidence of de-
 fect, 353
 similar precautions, as evidence of
 safety, 355
 photograph of, to illustrate testi-
 mony, 480
 inspection of, compellable at trial,
 662, 734, 1705
 before trial, 1339, 1343
 presumption of defect, from acci-
 dent, 2062
 Preparation, as evidence of crime,
 267
 Preponderance of evidence, 2027
 Prescription of title, by possession; *see*
 Possession
 of physician, as privileged, 1858
 Presence as evidence of design to com-
 mit crime, 267
 President, privilege of, 1849
 personal liability of one who signs
 note as, 1934a
 Press Copies, as originals, 784
 Presumption of good character, 660
 of continuity, 340, 2083, 2084
 of innocence, 2064
 legal effect of, 2012
 of law and fact, 2012
 conflicting counter, 2014
 of felonious intent from taking of
 goods, 2064
 possession of stolen goods as a,
 2066
 of title, from possession or payment,
 2067
 of consideration, 2069

Presumption — *Continued*
 of legitimacy in bastardy, 2080
 of life, or death, 2084
 see also Burden of Proof
 conclusive; *see* Conclusiveness
 Presumptive evidence, as meaning cir-
 cumstantial evidence, 109
 Pretences, false; *see* Representations
 Price; *see* Sales; Value
 Price-current, as qualifying a witness
 to value, 425
 as admissible in evidence, 1182
 Priest, confession to, 713
 privilege for communications to,
 1870
 see also Marriage
 Priest and Penitent, privileged com-
 munications created, 1870
 Prima Facie Evidence, statutes ma-
 king, 31, 906
 sufficient to go to jury, 2002
 Primary Evidence; *see* Best Evidence;
 Original Document; Copy
 Principal, admissions of, against
 surety, 687
 agent's admissions against, 687
 undisclosed, shown by parol, 1934
 joint, is accomplice, 1517
 see also Agent
 Printed Copy of public document
 sundry documents, 1164, 1622
 reports of decisions, 1181, 1623
 statutes, 1164, 1622
 see also Copy
 Printed Matter, as a duplicate original,
 784, 791
 sample copies as evidence, 340
 proving genuineness of
 newspapers, 1621
 official statutes and reports,
 1622, 1623
 see also Book; Mail; Newspa-
 per
 Printer, official, authentication of cop-
 ies of, 1622, 1623
 Prior and Subsequent; *see* Time;
 Condition
 Prison, escape from, as evidence of
 guilt, 652
 Private statute, judicial notice of,
 2131
 Privies in interest, admissions of; *see*
 Admissions
 Privilege
 I. *From Attending*
 no privilege in general, 1660
 illness, 1686
 sex and occupation, 1690
 officers of government, 1688
 distance from place of trial, 1692
 subpoena, 1663
 expenses, 1680
 II. *From Testifying*
 (a) *in general*
 no privilege in general, 1660
 of ambassador, 1689

INDEX OF TOPICS

[Numbers refer to sections §§]

Privilege — *Continued*

- officers having compulsory power, 1671
- privilege personal to witness, 1673
- (b) *privileged topics*
 - irrelevant matters, 1694
 - documents of title, etc., 1695
 - trade secrets, 1696
 - customers' names, 1696
 - official secrets, 1842
 - theological opinions, 1699
 - political votes, 1700
 - disgracing facts, 1701
 - bodily exposure, 1701
 - party interested, 1702
 - opponent compellable, 1702
 - production of documents, 1703
 - bodily exposure, 1704
 - premises and chattels, 1705
 - civil liability in general, 1707
 - husband and wife; *see* Marital Relationship
 - self-crimination; *see* Self-crimination
- (c) *privileged communications*
 - in general, 1760
 - mere pledges of privacy and oaths of secrecy, 1762
 - clerks, commercial agency, bankers, trustees, newspapers, etc., 1762
 - telegrams, 1763
 - of agent, 1775, 1796
 - attorney and client; *see* Attorney and Client
 - husband and wife; *see* Marital Relationship
 - physician and patient; *see* Physician and Patient
 - petit jurors
 - communications, 1825
 - impeaching a verdict, 1947
 - arbitrators, 1947
 - grand jurors
 - vote and opinion, 1830
 - witness' testimony, 1834
 - grounds for indictment, 1947
 - number of votes, 1947
 - official communications, 1849, 1688
 - government and informer, 1837
 - physician and patient, 1856
 - priest and penitent, 1870
 - offer of compromise, 642
- III. *Sundry Rules*
 - as permitting proof by copy, for privileged document, 775
 - as excluding production of attesting witness, 878
 - as allowing use of deposition, 936
 - claim of, on cross-examination, as excluding the direct testimony, 924
 - books of account, from production, 1660, 1686, 1762

Probable Cause for prosecution or arrest, evidence of belief of, 289

Probable Cause — *Continued*

- in malicious prosecution, burden of proof of, 2095
- judge or jury to determine former testimony as creating, 34
- Probate; *see* Will; Judicial Records
- Certified Copy; Attesting Witness
- Proceedings, presumption of regularity of, 2088
- Process, to secure corporation, 1663
- see also* Compulsory Process
- Judicial Records; Conditional Rules
- Proclamations, Executive, to evidence certain propositions, 1124
- Production of evidence in general
- failure to make, as showing a weak case, 664, 657
- of document or chattel
 - which party is bound to produce, 1941
 - by opponent at trial, 1703
 - by witness, 1662
 - subpoena duces tecum, 1663
 - privilege against self-crimination, 1730
 - of attorney and client, 1780
 - of government officials, 1842
 - before trial on discovery, 1342
 - proof by copy; *see* Original Documents
- Profert, required in proving a document, 1335, 1342
- see also* Production of Documents
- Profits, amount of receipt of; Contracts; Sales; Value
- Promise as excluding a confession; *see* Confession
- Proof, distinguished from admissibility, 37
- from relevancy, 14, 41
- beyond reasonable doubt, 2023
- Proofs of Loss, in insurance, as admission, 671
- coroner's verdict to show cause of death in, 1141
- as *res gesta*, 1242
- privilege waived by sending physician's certificate, 1866
- Property, conveyance of, as evidence of a weak case, 647, 653
- sales of other, as evidence of value, 356
- qualifications of a witness to value, 422
- value of, proved by assessor's books, 1101
- presumption of ownership from possession of, 2067
- see also* Possession; Custody; Contract; Premises; Ownership
- Prophylactic Rules defined, 745

INDEX OF TOPICS

[Numbers refer to sections §§]

Prosecution, may show accused's bad character in rebuttal only, 137
 malicious; *see* Malicious Prosecution
 delay or failure to institute, as evidence, 637
 impeaching eye-witnesses called by it, 515
 list of witnesses of, before trial, 1327
Prospectant Evidence, classification of, 125
Prostitution, enticement for, character of complainant as evidence, 138
 house of; *see* House of Ill-fame
 other offences as evidence of intent to entice for, 308
Protest; *see* Notary.
Prudence, opinion as to, 1445
 in matters of business, evidenced by acts of others, 355
Psychological expert, to test witness' credit, 560, 565
Public Corporation; *see* Corporation
Public Document
 1. *Admissible to prove the Facts stated therein*
 (a) *in general*
 general principle, 1090
 as best evidence, 896
 whether conclusive, or preferred to other testimony, 896, 1917, 1946
 official duty of maker, 1090
 deputies, *de facto* officers, etc., 1092
 absence of record to negative occurrence, 1092
 publicity of document, 1092
 officer's personal knowledge, 1097
 constitutionality of using as evidence, 929
 (b) *registers and records*
 sundry kinds, 1100
 assessment and electoral registers, 1102
 military and naval registers, 1102
 registers of marriage, birth, death, 1103
 certificates of marriage, 1106
 registers of ships, 1107
 stock - brands, timber - marks, 198, 1593
 registers of conveyances
 deeds and mortgages, 1110
 admissible only to prove deeds lawfully recorded, 1110
 in foreign state, 1111
 proof when registration is unauthorized or faulty, 1112
 certified and sworn copies, 1116
 certified copy of deed itself, 1116
 assignments of invention-patent, 1117

Public Document — *Continued*
 wills, 1118
 government land-grants, 1119
 judicial records, 1120
 corporation records, 1121
 legislative records, 1124
 (c) *returns and reports*
 sundry kinds, 1130
 sheriff's returns and recitals, 1131
 surveyor's returns, 1133
 former testimony reported
 judges' notes, 1136
 magistrates' reports, 1137
 bills of exceptions, 1138
 stenographers' notes, etc., 1139
 inquisitions and reports
 lunacy, 1140
 coroner's inquest of death, 1141
 census of population, 1143
 miscellaneous kinds, 1130
 (d) *certificates*
 miscellaneous kinds, 1145
 notary's protest, 1146
 deed-acknowledgments; oaths, 1147
 certified copies, 1152
 printed copies, 1164, 1622
 2. *Proving Contents and Execution of Public Documents*
 whether removable for use in evidence, 754, 1654, 1688
 production of original not required, 779
 provable by examined or sworn copy, 831
 by certified or office copy, 1152
 certified copy preferred to others, 831
 by printed copy, 1164, 1622
 any copy preferred to recollection, 821-826
 attesting witness dispensed with, 879
 see also Copy; Certified Copy
 whether the whole must be proved lost or destroyed record, 1566
 record accessible, 1568
 sundry public records, 1569
 judicial record, 1570
 genuineness, how proved
 by seal, 1633
 by official custody, 1630
 by certificate of attestation, 1152, 1633
 as privileged, 1656, 1688
 privileged as State secrets, 1849, 1689
 irremovability of, 1688
 see also Certificate; Execution; Judicial Record; Recorded Conveyance; Notary; Parol Evidence Rule
 Public Interest, matters of; *see* Reputation

INDEX OF TOPICS

[Numbers refer to sections §§]

Public Officer, impeaching his own certificate, 377
 having power to compel testimony, 1671
 privileged from testifying, 1849
 regularity of proceedings presumed, 2088
 appointment and authority presumed, 2089
 judicially noticed, 2133
see also Judicial Record; Public Document
Public Record; *see* Public Document
Publication, in newspaper, as evidencing knowledge, 287
 of libel or slander; *see* Defamation
 proving the fact of, without producing document, 801
 affidavit of, 1187
 of testimony in newspaper, forbidden, 1312
see also Printed Matter; Notice; Book
Publicity of trial, as a security for truth, 1312
 exceptions to the rule, 1312
 exclusion of mere spectators, 1312
Publisher; *see* Publication; Printed Matter; Copyright
Pupil; *see* Schoolmaster
Purchaser, knowledge of equitable or other interest by, 286
see also Grantee; Creditor; Sales
Putting in the Case; *see* Examination, III
Putting under the Rule; *see* Separation of Witnesses

Q

Qualifications of a witness; *see* Witness, I, *Qualifications*
Quality of a chattel, place, weapon, etc., as evidenced by its effects, etc., 340-355
 as evidenced by sales or rentals, 356
Quantitative Rules defined, 745
Quarrels,
 details of prior, to show hostility of deceased, 329
 to show bias of witness, 537
see also Motive; Intent; Bias; Deceased by Homicide
Question to a Witness, in hypothetical form, 1416
 in leading form, 462
 allowable only in discretion, 462
 judge may put leading, 474
 kinds of leading questions, 463
 exceptions to the rule, 455
 put to one's own witness, 512
 in misleading form, 467
 cross-examiner need not state purpose of, 467, 1360
 with intimidating or annoying manner, 468

Question to a Witness — Continued
 repetition of, 469
 multiple examiners, 473
 by the judge, 474, 1990
 topics of, for impeachment or purposes; *see* Direct Examination
 Cross-examination
 witness' prior knowledge of, 455
 continuous narration by witness without, 475
 stating the purpose of, 467, 1360
 as a foundation for impeachment
 by expressions of bias or corruption, 539, 545
 by self-contradiction, 579
 by a writing, 812
 by admissions of a party, 607
 impeaching a witness sworn but questioned, 1378
 relevancy of, no concern of witness, 1694
 self-criminating, not forbidden, 1742
 warning witness of right to refuse self-criminating answer, 1742

R

Race, evidenced by corporal traits, 2730
 disqualifying a witness, 374
 impeaching a witness, 527
 evidenced
 by reputation, 1069
 by family hearsay, 995
 corroboration required for admission, 1523
see also Aliens
Railroad, nuisance, nature of, 350
 measure of negligence, 355
 reputation to show ownership of premises or vehicles by, 1054
see also Negligence; Employee
 Premises; Highway; Spite
 Machine; Carrier; Rates
Rape, character of complainant as evidence, 138, 229
 of plaintiff in indecent assault, 156
 opinion rule applicable to manner of character of complainant, 1469
 other persons' intercourse as evidence of paternity, 191
 acts of unchastity, to show complainant's consent, 228
 under age of consent, other acts, 330
 other intercourse, as evidencing defendant's intent or motive, 330
 330
 other attempts on same woman in, 330
 improper familiarities as evidence of consent in, 330
 infant or imbecile witness in, 330
 371
 conduct of complainant, to impeach credibility, 552

INDEX OF TOPICS

[Numbers refer to sections §§]

ape — *Continued*

restoring credit of complainant, 598
 complainant's outcry or information, received, 622
 details of complaint, admissible, 1237
 who is accomplice in, 1517
 uncorroborated complainant in, 1520
 marital privilege in, 1723
 see also Age of Consent,
 ates of charge by railroad, conclusiveness of official schedule, 906
 atification; *see* Agency
 e-cross-examination; *see* Cross-examination; Examination, III
 e-direct Examination; *see* Examination, III; Direct Examination
 eading a prepared paper, by witness, 493
 a deposition to deponent before signing, 494
 impeachment of skill of a witness in, 562
 scientific books to jury, 1177
 eal Evidence (or Autoptic Profer-ence)
 defined, 105
 general principle and instances, 730
 color, resemblance, appearance, etc., to show age, paternity, etc., 730
 weapons, clothes, etc., in criminal cases, 731
 corporal injuries, in civil cases, 731
 indecent exhibition, 732
 liquor sampled by jurors, 732
 experiments, insanity, etc., 732
 physical inconvenience of production, 733
 view by jury, 734
 jury's view as evidence, 739
 whether an inscribed chattel must be produced, 749
 of premises, chattels, etc., discovery before trial, 1339, 1343
 not privileged, 1704, 1738
 eason for an act, hearsay statement of, 1202
 easonable Doubt, proof beyond, 2023
 easonableness, other persons' conduct, as evidence of, 355
 information received, as evidence of, 1256
 opinion as to, 1445
 judge or jury to determine, 2107
 see also Knowledge; Negligence
 ebuttal, of irrelevant evidence, by other irrelevant evidence, 46
 accused's bad character in, 137
 scope of testimony in, 1353, 1365
 e-call of a witness by opponent, whether it prevents impeachment, 511
 to ask as to a self-contradiction, 580
 see also Examination
 eceipt received as an admission, 202
 of land-office receiver, original required, 791

Receipt — *Continued*

production of original, in proving payment, 798
 admissible as statement against interest, 967, 969
 varied by parol, 1927
 presumption of payment, 2068
 Receiver of stolen goods, knowledge as evidenced by repute, 286
 as evidenced by other possession, 304
 thief not an accomplice of, 1517
 Recital in a deed, of another deed's contents, 807
 in a statute, whether conclusive, 905
 whether admissible, 1124
 in a sheriff's deed, whether conclusive, 906
 whether admissible, 1130
 in an ancient deed, of boundary or lost deed, 1040
 of pedigree, 1040
 in a will, as evidence of pedigree; *see* Family History
 of consideration, varied by parol, 1929
 Recollection
 (a) *in general*
 general principles, 427
 cross-examination to impeach, 429
 "impression," "belief," etc., 428
 examining to grounds of recollection, 429
 distinction between past and present, 431
 (b) *record of past recollection*, 431, 489
 general principle, 431
 must be written, 443
 contemporaneous, 432
 accuracy sworn to, 433
 attesting witness testifying without, 433
 witness not the writer, 435
 original, 436
 verification of copy, 437
 transactions by several persons (book-keeper and salesman, etc.), 438
 copier of statement as witness to, 432
 showing to opponent, 440
 handing to jury, 441
 (c) *present recollection refreshed*, 444
 general principle, 444
 any writing may be used, 444
 witness not the writer, 446
 original, 447
 contemporaneous, 448
 depositions used, 448, 507
 to refresh, of hostile witness, 448
 showing to opponent, 449
 handing to jury, 450
 use by cross-examiner, 451

INDEX OF TOPICS

[Numbers refer to sections §§]

Recollection — Continued

(d) sundry rules

- refreshing the memory of one's own witness by his prior self-contradiction, 507
 - cross-examination to test, 562
 - contradicting by showing failure of, 570, 577
 - self-contradiction by failure of, 585, 590
 - lost instrument provable by, 821-826
 - preference of copy of a document, to recollection of contents; *see* Copy of a Document, 2
 - failure of recollection of attesting witness, 866
 - refreshing recollection by report of prior testimony, 890
 - by seeing specimens of writings, 1478
 - stenographer's notes, as preferred to, 893
 - report used by magistrate or clerk to aid, 1137
 - books of account used as memoranda of, 1012
- Record, of stock-brand, as evidence, 198, 1593**
- of business, used by witness not having personal knowledge, 410
 - of public office in hands of successive officials, 406
 - of a predecessor, as qualifying a witness to handwriting, 420
- production of, under original document rule, 754**
- of recollection of a witness; *see* Recollection
- of conviction of crime, to impeach a witness; *see* Conviction of Crime**
- judicial; *see* Judicial Record**
- official, in general; *see* Public Document**
- of conveyance; *see* Recorded Conveyance**
- voluminous, proved by summary, 782, 797
 - of assignment, 1117
 - absence of an entry in, how proved, 782, 797, 1155, 1453
 - abstract of burnt, 1183, 1566
 - copy received of torn or illegible, 832
 - certificate of effect of, 1145
- Recorded Conveyance**
- record-book admissible, instead of, copy of it, 754, 1116, 1688
 - conveyance on file in public office, 779
 - production of original deed not required, 781
 - preference for certified copy, 831
 - copy of a copy, 832
 - mode of proving copy, 823
 - production of attesting witness excused, 852, 879

Recorded Conveyance — Continued

- record admissible to prove deed and execution
 - deeds, etc., lawfully received, 1110
 - record in another jurisdiction, 1111
 - unauthorized record, 1112
 - proof of other matters re, 1112
 - certified and sworn copies
 - whole of record must be, 1569
 - kinds of certified copies admissible, 1152
 - certificate of acknowledgment and, 1147
 - assignment of invention-patent will, 1118
 - government land-grant, 1119
 - copy of ancient deed recorded, 1112
 - presumption of consideration, delivery, notice, seal, etc., 1112
- Reformation of contract, in, 1906**
- Refreshment of Memory; *see* Recollection**
- Refusal, to escape, as evidence of innocence, 652, 665**
- to produce witness or document
 - evidence of a weak case, 652
- Register of enlistment, as evidence, 1102**
- official, in general; *see* Public Document
- Register of Deeds; *see* Recorded Conveyance**
- Register of Land-office; *see* Land Office**
- Register of Marriage, Birth, or production of original record, 779**
- not preferred to eye-witness of marriage, 896
 - preferred as proof of birth, 896
 - admissible as a deceased person's regular entry, 1005
 - as an official record, 1103
 - certified copy of, by custodian, 1112
 - sworn copy of, by custodian, 1112
 - not required in bigamy, 1543
 - copy of whole required, 1569
 - presumed genuine, from official today, 1630
 - identity shown by name, 2082
 - kept in a family, as evidence, Family History
- Register of Ship, whether conclusive, 905**
- whether admissible, 1102, 1112
- Registration of Title or Deed, proved by copy, 791**
- whether conclusive, 905
 - whether admissible, 1107
 - as a required formality, 1950
 - as presuming delivery of deed, 2
 - see also* Recorded Conveyance

INDEX OF TOPICS

[Numbers refer to sections §§]

lar Entries, exception to the Hearsay rule, 1002
 as an aid to recollection; *see* Recollection
Regular Entries in general, 1003
 death, absence, etc., of entrant, 1003
 admissible to avoid mercantile inconvenience, 1003
 kind of business, 1005
 duty to superior, 1006
 regularity, 1007
 contemporaneousness, 1008
 oral reports, 1011
 personal knowledge, 1012
 salesman and bookkeeper acting jointly, 1012
 form of entry, 1009
 absence of entry to negative transaction, 1010
 impeaching credit, 1015
 production of original, 1015
 I. *Parties' Account-Books*
 no clerk, 1019
 cash payments, 1020
 goods delivered to third person, 1021
 special contracts, 1021
 kind of business, 1021
 of book, 1023, 1032
 of item, 1021
 contemporaneousness, 1024
 regularity, 1022
 honest appearance, 1025
 reputation for correctness, 1026
 suppletory oath; cross-examination, 1029
 used by or against surviving party, 1029
 personal knowledge, 1028
 party and salesman jointly acting, 1028
 form of entry, 1027
 must show delivery as well as order, 1027
 impeaching the book, 1031
 using the entries as admissions, 1031
 production of original; ledger and day-book, 1032
 regularity of official proceedings presumed, 2088
 gulations, of department, judicial notice of, 2131
 relationship, hearsay statements, as evidence of; *see* Family History
 bearing on good faith in conveyance, 325
 in financial matters, to show bias of witness, 536
 lease, varied by parol, 1927
 see also Document
 relevancy, distinguished from admissibility, 37
 general considerations affecting the rules of, 38

Relevancy — *Continued*
 distinguished from minimum probative value, 38
 from weight or proof, 41
 logical theory of, 117
 of facts admitted conditionally on further evidence, 121, 1360
 no privilege for irrelevant matters, 1694
 Religious Belief, as disqualifying a witness, 374
 as influencing a confession, 713
 as impeaching a witness, 527
 as requisite for an oath, 1287
 disclosure of, privileged, 1699
 Renewal, agreement for, shown by parol, 1932, 1934a
 Repairs, of a machine or place, to evidence negligence, 649
 Repetition, of questions to a witness, 469
 of defamatory utterances; *see* Defamation
 Reply to letter by mail, as genuine, 1624
 to telegram, 1625
 opponent's case in, 1362
 see also Letter
 Report of an official, 1130
 of injury, made by agent to principal, as privileged, 1797
 of a magistrate; *see* Magistrate
 of domain, pedigree, title, etc., 1130
 of a judicial decision
 by officially printed copy, 1164, 1622
 by private printed copy, 1181, 1623
 of a magistrate; *see* Magistrate
 proving genuineness of, 1621
 of particular business required by law, privilege for incriminating matters in, 1738
 of testimony, kinds of; *see* Former Testimony
 of a clerk or bookkeeper; *see* Regular Entries
 see also Public Document
 Reports, sundry, 1130
 Representations, knowledge of falsity of, as evidenced by repute, 285
 as evidenced by other false representations, 303
 Reputation
 1. *Land-boundaries and Land-customs*
 matter must be ancient, 1053
 kind of reputation, 1052
 private boundaries proved by, 1054
 possession proved by, 1054
 title proved by, 1054
 qualifications of witness, 1055, 1058
 source of, 1059
 form of reputation, 1060

INDEX OF TOPICS

[Numbers refer to sections §§]

Reputation — Continued
 from old deeds, leases, maps, surveys, etc., 1060

2. *Events of General History*
 ancient matters of general interest, 1062
 historical works to evidence, 1062
 judicial notice of, 2135
 proved by scientific treatises, 1170

3. *Marriage and other Facts of Family History*
 marriage, 1066
 absence, ancestry, birth, death, legitimacy, race, relationship, residence, 1069

4. *Moral Character of Party or Witness*
 reputation distinguished from character, 128, 518, 1071
see also Character
 as mitigating damages in defamation, 239
 of deceased in homicide, to evidence accused's belief, 278
 of employee, to evidence employer's knowledge, 281
 of lunatic, insolvent, or partner, to evidence purchaser's knowledge, 285
 of arrested person, as evidencing probable cause, 285
 qualifications of a witness to, 417
 witness to, cross-examined as to rumors, 557, 605
prima facie evidence of crime, under statute, 906
 constitutionality of using, as evidence, 929
 of honesty, required for a party's account-book, 1026
 place and extent of reputation, 1075
 time of reputation, 1076
 kind of character reputed (chastity, sanity, temperance, etc.), 1078
 to prove common offender, 1078
 of animal to evidence disposition or pedigree, 1078
 witness' or party's character; *see also* Character

5. *Sundry Facts provable by Reputation*
 solvency, wealth, 1085
 partnership, 1086
 knowledge of partnership, 287
 incorporation, 1087
 miscellaneous facts, 1087
 party's knowledge of a fact reputed, 1256; *see also* Knowledge

Res Gestæ, complaint in rape, as part of, 622, 1237
 in robbery or larceny, 626, 1238
 confusion of, with declarations of intent, 1208

Res Gestæ — Continued
 statements of mental or physical condition, 1200
 of the circumstances of an injury or affray, 1230
 after corporal injury, 1230
 of intent or motive, 1200
 exclamation of bystander as, 1211
 declarations by an accused, 1211
 plaintiff's conduct as, 1242
 utterances in contract as, 1242
 proofs of loss as, 1242
 words accompanying the taking in conversion, 1246
 showing words as, in consideration as, 1246
 accompanying statements in relation as, 1246
 claim of title as part of, 1247
 exclamations in a mob or riot, admission of agent or co-conspirator as, 687
 utterances a part of the issue verbal acts; *see* Hearsay Rule, general theory of doctrine, 1247
see also Spontaneous Exclamations; Verbal Acts; Mental Condition, Declarations

Res ipsa loquitur, 2062

Resemblance of child, as evidencing paternity, 209, 730
see also Identity

Residence, evidenced by prior residence, 320
 presumed to continue, 2083
see also Domicil

Resistance, as evidence of guilt, 652

Return, of sheriff, 1130
 of surveyor, 1133
 of sundry officers, 1130
 distinguished from certificate, 1134

Revocation, testator's utterances as evidence, 1218, 1251

Reward, as impeaching a witness, 548
 as excluding a confession, 710

Riot, other acts, as evidencing, 314
see also Mob

Road; *see* Highway

Robbery, possession of goods or money as evidence of, 200, 201, 2066
 other crimes, as evidencing intent, 309
 motive for, 326
 owner's complaint after, as *res gestæ*, 627, 1238
 proof of identity in; *see* Identity

Roentgen-ray photograph, 483
see also X-ray

Roman Catholic as a witness; *see* Religious Belief

Rule, "Putting under the rule"; *see* Separation of Witnesses

Rules of Court, judicially noticed, 214
 limiting right of cross-examination to one counsel, 473

Ruling upon objections, 94

INDEX OF TOPICS

[Numbers refer to sections §§]

ling — *Continued*

error of, as ground for new trial, 102
 mors, on cross-examination of a witness to reputation, 557, 605
see also Reputation

S

fety of machine, premises, etc., as evidenced by other instances, 350, 355

opinion as to, 1445

les, course of business in, as evidence of a transaction, 171, 317, 319

of liquor; *see* Liquor-selling
 of other property, as evidence of value, 357

as qualifying a witness to value, 423

as evidence of intent; *see* Fraud; False Representations; Fraudulent Transfers

price, etc., as evidence of a motive, 326

decrease of, as evidence of nuisance, etc., 356

production of instrument, in proof of fact of, 799

buyer's utterances, used against seller's creditor, 1249

intent of debtor in, 1458

presumption of fraud applicable to, 2048

books of account, as evidence of; *see* Regular Entries

warranty in, shown by parol, 1930

statute of frauds applied to, 1950

see also Grantor

salesman, using entry to aid recollection; *see* Recollection; Regular Entries

sample, as evidence of an entire lot, 342

Sanity (or Insanity), conduct as evidence of, 252

hereditary, as evidence of, 263

capacity of insane person to testify, 367

of testator, qualification of witness to will as to, 416

witness' experience in, or knowledge of, 384, 409, 416

witness' insanity, in impeachment, 524

inspection of insane person by tribunal, 732

insanity excusing absence of an attesting witness, 877

of a deponent, 938

of a declarant of facts against interest, 967

of a maker of regular entries, 1003

insanity disqualifying dying declarant, 957

Sanity — *Continued*

provable by reputation, 1078

by inquisition of lunacy, 1140

by declarations of testator, 1222

by opinion testimony, 1430

by inspection, 1704

burden of proof of, in civil issues, 2041

in criminal trials, 2045

presumed to continue, 2083

hypothetical question as to; *see* Hypothetical Question

see also Lunatic; Insanity

Science, men of, as witnesses; *see* Expert Witness

instruments and tabulated data of, used by a witness, 407, 408, 483

books of, physician's testimony based on, 409

used in evidence, 1170

judicially noticed, 2120

Scienter; *see* Knowledge; Owner; Animal

Scientific Books; *see* Learned Treatises; Science

Scintilla of evidence, 2002

Scrip, of land grant; *see* Deed

Seal, official, as authenticating a document

general principle, 1633

seal of State, 1638

of court or clerk, 1639

of notary, 1640

of sundry officers, 1641

official signatures, 1642

title to office, 1635

attested copy under seal, 1152, 1158, 1160

corporate seals, 1643

presumption of consideration from, 2069

judicial notice of foreign, 1641, 2120

of foreign court of admiralty presumed genuine, 1160, 1639

Search, evidence obtained by illegal, 1656

for lost document, 760

for attesting witness, 873

Seaworthiness, presumption of, 2085

Secondary Evidence, are there degrees of, 822

Secret of trade, as privileged, 1696

of State, 1842

of friendship, 1760

see also Privilege

Security, agreement to hold deed as, shown by parol, 1933

Sedition, other acts as evidencing intent, 314

other persons' utterances, as a standard of loyalty, 355

putting in the whole of an utterance, 1549, 1576, 1580

see also Defamation; Treason

Seduction

character of the woman as in issue or mitigating damages, 156-165

INDEX OF TOPICS

[Numbers refer to sections §§]

agreement for, shown by parol, 1934a
 it, offer of, as an admission,
 a highway defect; *see* Highway
 disqualifying a witness, 374
 debtor's admissions used
 1st, 687
 of, conclusiveness, 906
 in deed by, to prove authority
 all, 1130
 of process
 conclusiveness, 901
 missibility, 1130
 g-book of; *see* Log-book
 e also Vessel
 r-register; *see* Register
 g, as a crime; *see* Homicide
 ks, parties'; *see* Regular En-
 s
 nd; *see* Stenographer
 s, at a view by a jury, 734, 1268
 tk; *see* Highway
 :vidence of capacity of, 245
 ss' defective, as affecting credit
 observation, 526, 562
 lying declaration by making, 957
 nony by making; *see* Deaf-mute
 ure, modes of evidencing genu-
 eness; *see* Handwriting
 ery of; *see* Forgery
 eponent to deposition, 495
 ial, is not of attesting witness,
 3
 iber of attesting signatures to be
 oved, 884
 attesting witness or maker of doc-
 ument, 883, 886
 of of unobtainable attesting, dis-
 ensed with, 883
 ewritten or stamped, 1620
 a formality required, 1950
 illiterate's mark; *see* Illiterate
 tificate authenticated by, 1633
 official, as presuming genuineness,
 1639, 1641
 agent, creating a personal liability,
 1934a
 ie of, 2069
 eration of; *see* Alteration
 ice, as an inconsistency impeaching
 a witness, 587
 an admission by a party, 666
 impeaching complainant in rape,
 622
 ilar Acts,
 o show Knowledge, Design, or In-
 tent, 297-314
 o show intent in arson, 310
 assault, 312
 blackmail, 309
 bribery, 307
 burglary, 309
 counterfeiting, 302
 forgery, 302
 rape; *see* Rape

Similar Acts — *Continued*
 of adultery or bigamy, material to
 show motive or intent, 330
 to evidence Knowledge, Design or
 Intent in civil cases, 315
 as evidence of authority to accept bill
 of exchange, 317
 as evidencing Habit, Plan, or System
 in contracts, 317
 as evidence of danger, 350
 see also Design; Intent; Knowl-
 edge
 Similar Instances, of human conduct;
see Negligence; Character; Simi-
 lar Acts
 of effects of a machine, weapon,
 place, etc., to evidence cause, con-
 dition, or quality, 342-355
 Similar Statements by a witness; *see*
 Witness, III
 Simplificative Rules defined, 745
 Skill, as evidence of an act done, 167,
 168
 instances of, as evidence, 228, 237,
 355
 mode of evidencing, 242
 of a witness; *see* Expert Witness
 opinion as to another person's, 1445
 Slander; *see* Defamation
 Slave,
 ancestry of, as evidence by color, 210
 see also Race
 Sleep, confession in, 715
 Smoke; *see* Nuisance
 Snow, as a highway defect; *see* High-
 way
 as a kind of weather; *see* Weather
 Sodomy, other offences, as evidencing
 intent, 330
 Solvency, as evidence of payment, 169
 false statements as to; *see* False
 Representations
 as evidenced by prior condition, 320
 by reputation, 285, 1085
 by opinion, 1455
 see also Debtor; Bankrupt; In-
 solvency; Payment
 Sound, distance or quality of, as shown
 by instances, 354
 Sovereign; *see* King; Executive
 Space; *see* Distance
 Sparks from a locomotive, as evidence
 of negligence or cause, 351
 presumption of negligence from, 2062
 Specialty, discharged by parol, 1950
 Specimen of handwriting; *see* Hand-
 writing
 Speculative testimony to injury, 404
 Speed, expert qualifications of witness
 to, 387
 opinion testimony to, 1464
 Spelling, traits of, as evidence of au-
 thorship, 175
 expert testimony to, 1491
 Spiritism; *see* Telepathy
 Spoliation of evidence in general, as
 indicating guilt, 654

INDEX OF TOPICS

[Numbers refer to sections §§]

Spoilation — Continued
of documents, as evidence of contents, 662
of execution, 1597
as creating a presumption, 2069

Spontaneous Exclamations,
general theory, 1230
death, absence, etc., need not be shown, 1230
need not be contemporaneous, 1233
time not essence of doctrine, 1233
bystander's declaration admissible, 1236
of one in a collision, 1236
in connection with assault or homicide, 1236

Spouse; see Marital Relationship;
Husband; Wife

Spy, as impeached by his interest, 548
whether corroboration is needed, 1517

Stains; see Blood

Stamp, law requiring, whether *lex fori* is applicable, 21
exclusion of documents lacking, 1656
required formality of, 1950

Standard of handwriting; see Handwriting

State, statute of, when applicable, 21
seal of, presumed genuine, 1638
secrets of, privileged, 1698, 1842
who determines necessity for secrecy, 1843
judicial notice of foreign, 2120
conducting a prosecution; *see* Prosecution; Defendant
see also Foreign Law

Statement
adoption of, as an admission, 677
of pain or suffering, 1201
to a physician, 1202
after suit brought, 1205
of design or plan, 1208
of intent in domicil cases, 1209
of intent in bankruptcy cases, 1210
of motive, reason, or intent, 1211
of emotion, bias, malice, or affection, 1212
by accused person, 1213
improper, in argument by counsel, 1272
see also Against Interest

State of Mind; see Belief; Intent; Motive; Knowledge; Mental Condition

Statute Book, proving genuineness of, 1164, 1622

Statute, Federal or State, applicable in Federal trials, 21
limiting judicial powers is invalid, 31
mode of proof
of foreign, domestic, public, private, 1164, 1622
by official printed copy, 1164, 1622
by private printed copy, 1181, 1623

Statute — Continued
by expert, without copy, 829
copy of whole required, 1569
enrolment, conclusiveness of, 903
conclusiveness of recital in, 905, 1
judicial notice of, 2131
constitutionality of; *see* Constitutional Rules
recital in; *see* Recital
see also Law; Foreign Law

Statutes
Federal, respecting "trials at common law," 21
constitutionality of, defining, 906
pertaining to wills, ballots, insurance policies, under parol evidence, 1945
granting immunity from criminal prosecution; *see* Immunity

Statute of Frauds, whether *lex fori* applicable, 21
provisions requiring numbers of witnesses, 1508, 1510
requiring formality of writing, 100

Statute of Limitations, other defamatory utterances barred by, 331
indorsement of payment, as removing the bar, 970, 975
annuls privilege against self-crimination, 1753
see also Time

Stenographer, notes of testimony taken by, 1139
testifying from notes of former testimony, 431, 444
notes, as preferred to recollection, 893
see also Recollection

Stipulation; see Judicial Admission

Stock; see Animals; Business; Corporation; Value

Stockholder, books of corporation used against, 674
admissions of, 686

Stolen Goods, possession of, as evidence of larceny, etc., 200, 206
other, found on search, to show motive, 325
knowledge of receiver or possessor of, as evidenced by reputation, 286
as evidenced by possession of other goods, 304
accused's explanation, of possession, 1245, 1246, 1250
presumption from possession of, 200
see also Larceny

Street, defective; see Highway

Street Car, see Negligence

Strength, as evidence of an act done, 167, 168, 250
instances of conduct, to prove, 241
mode of evidencing, 241, 237
of deceased, to evidence self-defence, 278

INDEX OF TOPICS

[Numbers refer to sections §§]

strength — *Continued*
 expert qualifications of witness to, 387
 strike Out, motion to, a document, or evidence, 82
 trychnia; *see* Poison
 subornation, as evidence of guilt, 654
 other crimes as evidencing intent in, 307
 as impeaching a witness, 542
 who is accomplice in, 1517
 see also Perjury
 subpoena,
 officers having power to issue, 1671
 general practice, 1663
 duces tecum, 1663
 necessary for proving third person's detention of document, 775
 cross-examination of witness under, 1378
 expenses, 1680
 subscribing Witness; *see* Attesting Witness
 sue, agreement not to, shown by parol, 1878, 1931, 1934a
 suffering, expressions of, 1201
 sufficiency of highway, cattle-guard, machine, etc., as shown by effects, 355
 of a search; *see* Search
 of evidence, judge to determine, 1999, 2101
 opinion testimony as to, 1445
 suggestion to a witness, by leading questions, 462
 by other improper modes, 455
 suicide, deceased's intention of, as evidencing innocence of an accused, 195, 1208
 plans of, to negative homicide, 183
 motive for, 195, 325
 presumption of insanity from, 2041
 presumed instead of accident, 2063
 summary of voluminous records or accounts, 782, 796
 Suppletory Oath for books of account, 1029
 supporting a witness' credit; *see* Witness, III
 suppression of evidence, as indicating guilt, 654
 surety, principal's admissions used against, 687
 using principal debtor's statement against, 968
 parol agreement to hold only as, 1934, 1934a
 Surgeon; *see* Physician
 surprise; *see* Unfair Surprise
 Surrebuttal, scope of testimony in, 1366
 Surrender to arrest, as evidence of innocence, 294, 665
 Survey, as evidence of adverse possession of a whole tract, 318

Survey — *Continued*
 as illustrating testimony, 480
 not to be impeached, 901
 as declaration or reputation of boundary; *see* Boundaries
 as an official document, 1133
 judicially noticed, 2133
 Surveyor, records of a predecessor, as qualifying a witness to handwriting, 420
 official, not required in proving boundaries, 482
 testimony not required, 897
 opinion testimony to boundary; *see* Boundaries
 declarations about boundaries; *see* Boundaries
 official return of, 1133
 as regular entry; *see* Regular Entries
 Survivor disqualified as a witness, 391
 use of account-books by or against, 1029
 testimony must be corroborated, 1522
 Survivorship, presumption of, 2084
 Sustaining an objection, 71
 a witness' credit; *see* Witness, III
 Swearing; *see* Oath
 Switch; *see* Premises
 Switch-lights; *see* Railroad
 Sworn Copy; *see* Copy
 System,
 of conduct, as evidencing a crime, 300
 similar acts to show, in crime, 220
 see also Similar Acts

T

Table of weights, etc., used in evidence, 1174, 1182
 of mortality, used in evidence, 1174, 2120
 of interest, used in evidence, 1130
 use of calculating, 407
 Tally-book of voters; *see* Election
 Tax, payment of, as evidence of liquor-selling, 267
 fraud in, other acts as evidencing intent, 307
 books of assessment or collection of; *see* Assessor's Books
 Tax-collector, conclusiveness of deed of, 806
 admissibility of recitals of, 1130
 Tax-list, production of original, 791
 Teacher; *see* Schoolmaster
 Telegram, delivery of, as evidenced by dispatch of original, 172
 production of original, 780, 791
 received in reply, as genuine, 1626
 not privileged, 1763
 receipt of, as evidence of authorship, 2069

INDEX OF TOPICS

[Numbers refer to sections §§]

Telepathy, testimony based on, 483
 Telephone, testimony to conversations by, 412
 authenticating a conversation by, 412, 1594
 Tenancy, production of lease, in proof of, 799
 disputing landlord's title, 978
 declarations made during possession, 1247-1249
 Tendency, of a machine, weapon, place, etc., as evidenced by its effects, etc., 340-355
 to criminate, facts having, 1736
 Tender of witness' expenses, 1680
 Utterances qualifying as, 1246
 Terms, varying the, of a document, 1915
 of court, noticed, 2134
 Test; *see* Experiment
 Testator, conduct as evidence of sanity, 254
 utterances evidencing insanity, 1257
 family relationship of, 259
 conduct and utterances of, 259
 belief, as evidence of will's execution, 293
 statements of execution, contents, revocation, undue influence, etc., 1218-1224
 ante-testamentary statements by, 1219
 post-testamentary statements by, 1220
 statements as to intention to revoke, 1221
 as to undue influence or fraud, 1222
 incapacity of, to resist influence, 1222
 opinion testimony to legal capacity of, 1454
 intention of, 184
 intent or mistake of; *see* Parol Evidence Rule, D
 burden of proof of insanity, 2041
 of undue influence, 2046
 see also Will; Sanity
 Testimonial evidence, defined, 109
 relative value of, 115
 general theory of, 360
 rules for admissibility of; *see* Witness
 Testimonio; *see* Deed
 Testimony,
 motion to strike out, 82
 based on telepathy, 483
 rules of testimonial preference, 900
 rules of conclusive preference, 900
 at criminal trial admitted in civil, 919
 expressed by acting, 479
 comment by counsel on accused's failure to give, 1746
 voluntary, as a waiver, 1808
 see also Witness; Evidence; Expert Witness; Former Testimony; Examination; Question to a Witness

Theological belief; *see* Religious belief
 Thing; *see* Chattel; Premises; Highway; Animals; Weapon; Machine
 Think; *see* Belief
 Third Person, crime of, as evidence accused's innocence, 194
 threats of, to negative guilt of accused, 194, 1208
 character of, as evidence of his motive of, 194
 letter of, as evidencing testator's intent, 252
 flight of, as evidence of guilt, 652
 confession of guilt, 194, 971
 fraud of, as evidence of a weak character, 656
 admissions of; *see* Admissions
 Threatening Letters; *see* Extortion
 Threats of an accused, as evidence
 doing the act, 178, 1213
 in general, 178
 conditional, 178
 time of, 178
 explaining away, 178
 limitations on admissibility of, 182
 of a deceased, as evidence of self-defence, 182, 279
 as excluding a confession; *see* Confession
 of a third person, as evidencing innocence of the accused, 194, 1208
 Ticket, completeness of contract in, 1927
 Timber, marks on, as evidence of ownership, 198, 1593
 register of, as evidence, 198, 1593
 Time of possession of money, as evidence of payment, 169
 of threats of an accused, 178
 of intercourse in bastardy, 191
 of possession of stolen goods, 200
 of health, strength, etc., 250
 of sanity, 264
 of intoxication, 265
 of defect in highway, 284
 of possession, coverture, debt, etc., 320
 of intercourse in sexual offences, 337
 of other defamatory utterances, 331
 of utterances, as evidencing identity, 336
 of other injuries or effects, as evidencing cause, 340
 prior or subsequent existence, to prove present existence, 342
 of other weather-conditions, 342
 of other spark-emissions, 351
 of work done, or things seen or heard, as shown by other instances, 354
 of values, 357
 of qualifications of witness, 362, 367, 393

INDEX OF TOPICS

[Numbers refer to sections §§]

me — *Continued*
 of objection to a witness' qualification, 72, 365, 393
 of securing specimens of handwriting, 419
 of memorandum in aid of recollection, 432, 448
 length of, for a witness' examination, 473
 of character of a witness, 521
 of condition of an object, 730
 as presuming loss of document, 762
 of notice to produce an original, 769
 of plural depositions, 916
 of birth, death, etc., proved by family hearsay, 995
 of certifying a copy, 1152
 of recording a deed, 1110
 of hearsay expressions of pain, 1201
 of *res gesta* utterances, 1233, 1245
 identified by a person's utterances, 1258
 opinion evidence to, 1464
 of putting in testimony, 1353
 of execution of ancient document, 1608
 lapse of, presuming payment, 2068
 of execution of document, 2069
 of alteration of document, presumed, 2069
 of death, not presumed, 2084
 of survival, not presumed, 2084
 what is a reasonable, judge or jury to determine, 2107
 judicially noticed, 2135
see also Act
 Title, by adverse possession; *see* Possession
 documents of; *see* Document; Recorded Conveyance; Deed
 registration of; *see* Registration of Title
 disclaimer of, as a fact against interest, 969
 of landlord disputed by tenant, 968
 proved by reputation, 1054
 assessment-books as evidence of, 1102
 official register of, 1107
 registration as showing claim of, 1246
 inquisition of, by the sheriff, 1130
 abstract of; *see* Abstract
 deeds of, privilege for, 1695
 presumption of, from possession, 2067
 from lost grant, 2069
 to bill of exchange, 2067
 to office, presumption of, 2107
 admissions of; *see* Admissions
see also Ownership; Land Office
 Tombstone, as evidence of pedigree; *see* Family History
 Tortfeasor, admission by, 687
see also Contribution
 Tools, possession of, as evidence of a crime, 168, 267, 302

Tools — *Continued*
 of burglary, 197, 200, 267
see also Machine
 Traces as evidence of criminal's identity, 196, 197
 Tracks; *see* Footprints
 Trade, secret of, as privileged, 1696
see also Custom; Usage
 Trade Journal; *see* Newspaper
 Transcript of stenographic notes, of testimony; *see* Former Testimony
 Transfers, in fraud of creditors, mode of evidencing intent, 306
 admissions of debtor or creditor, 692
 Translation, required for alien's testimony, 496
see also Interpreter
 Travail, complaint in, by bastard's mother, 626
 Traveller; *see* Highway
 Treason, other acts of, as evidencing intent, 314
 confession of, as dispensing with two witnesses, 1503
 list of witnesses before trial, 1327
 two witnesses to overt act, 1503
 Treatise, scientific, used in evidence, 1170
 Treaty, judicial notice of, 2132
 proof by copy; *see* Public Document
 Tree, family, as evidence of pedigree; *see* Family History
 Trespass, by battery, evidence of intent in, 312
 to property, evidence of intent in, 314
 Trial, at common law in Federal court, rules for, 21
 new trial, motion for, to confirm an exception, 97
 material of ruling, as ground for, 102
 demeanor during, as evidence of guilt, 651
 severance of, of persons jointly charged as a removal of interest, 389
 publicity of, as a security for truth, 1312
 exclusion of spectators, 1312
 prohibition of printed reports, 1312
 separation of witnesses during, 1314
see also Inspection; Witness; Pleading
 Trover, notice to produce document converted, 768
 proof of conversion, without producing original, 801
 Trust, agreement to hold property in, shown by parol, 1933
 Trustee, admissions of, 686
 communications to, not privileged, 1762
 Truth of defamatory words; *see* Defamation

INDEX OF TOPICS

[Numbers refer to sections §§]

Turntable; *see* Premises
 Typewriting, manifold copies by, as originals, 784
 proving genuineness of, 1620
 authorship of letter in, evidenced from style, 168

U

Unchastity; *see* Chastity
 Understanding, testimony to a witness;
 see Belief; Opinion
 as varying a document; *see* Parol Evidence Rule
 Under-valuation; *see* Importation
 Undisclosed Principal, shown by parol, 1934
 Undue Influence, testator's statements of, 1222
 burden of proof of, 2046
 see also Will
 Unfair Prejudice; *see* Prejudice
 Unfair Surprise, as applied to conduct to show character in issue, 218, 231, 1326
 in showing particular acts of negligence in civil cases, 228
 of unchastity, 229
 two aspects of, distinguished, 231
 in showing conduct to evidence character in seduction, 234
 justifying acts in defamation of character, 236
 showing acts of incompetence by employee or physician, 238
 evidencing tendency, capacity, quality, 349
 showing collateral facts to impeach witness, 567
 self-contradiction, 574
 preliminary warning to guard witness against, 579
 as grounds for discovery, 1325
 Unilateral Acts; *see* Parol Evidence Rule, B
 United States, conflict between State law and Federal law, 21
 Unseaworthiness, presumption of, 2085
 Unskillfulness; *see* Skill; Negligence
 Usage, among conveyancers, proved by repute, 1087
 as proved by opinion, 1450
 varying the terms of an agreement, 1937
 interpreting a document, 1961, 1962
 see also Custom; Habit
 Use of machinery, premises, etc., as evidence of safety, etc., 355
 Usury,
 shown by parol evidence, 1896
 terms of a contract of; *see* Contract
 Utterance of other forged documents or money; *see* Forgery; Counterfeiting
 of libel or slander; *see* Defamation

Utterance — *Continued*
 as identifying a time or place, 336
 separate, excluded, 1580
 incorporated by reference, 1582
 under rule of completeness; *see* Whole of an Utterance
 see also Hearsay Rule, III

V

Vacuum-ray photograph, 483
 machine, use of, 407
 see also X-ray
 Validity, under substantive law, 1641
 Value, of an article sold, as evidence of price agreed, 326
 witness to, tested by adjacent value, 357
 of property taken, as evidenced other sales, 357
 experience or knowledge as qualifying witness to, 414, 422
 impeached by inconsistencies, 586
 special training or occupation unnecessary to estimate, 422
 of land, 423
 of services, 424
 of chattels, 425
 witness to, must know market, 425
 knowledge of, must be of vicinity, 425
 must not be by hearsay, 425
 estimating, from price-lists and trade journals, 425, 1182
 provable by jury's view, 739
 by books of assessors, 1101
 by opinion testimony, 1435
 jury may use general knowledge of, 2127
 of evidence; *see* Weight
 see also Sales; Damages
 Varying the terms of a document; *see* Parol Evidence Rule
 Vehicle, injuries to, as evidence of highway defect, 353
 character of driver of; *see* Negligence
 standard of conduct as passengers, employees, etc., 355
 Vendor; *see* Grantor
 Vendee; *see* Grantee
 Venereal disease, as evidence of adultery, 206
 Veracity, character for; *see* Character
 Verbal Acts, general principles, 1245
 distinction between, and *res gestae*, 1200
 distinguished from statements of intent, 1208
 intent in domicil cases, 1209
 conduct must be equivocal, 1245
 words must aid in completing act, 1245
 act must be material to issue, 1245

INDEX OF TOPICS

[Numbers refer to sections §§]

al Acts — *Continued*
 words must accompany conduct in time, 1245
 le applied to receiving money, acceptance, advancement, agency, consideration, conversion, dedication, 1246
 ile applied to delivery, entry, gift, larceny, loan, payment, sale, sundries, 1246
 assessor's declarations on issue of prescription, 1247
 eclarations of claimant of title, 1249
 eclarations by accused found with stolen goods, 1250
 affecting revocation of will, 1251
 of a bankrupt, 1252
 as to domicile, 1253
 ragmentary utterance, rule of completeness, 1260
 see also Hearsay Rule, III; *Res Gestæ*
 rdict, not to be impeached by jurors, 1947
 determination of, by lot, 1947
 acceptance of, by court, 1947
 direction of a, 2006
 mistake in rendering, 1947
 see also Judicial Record
 erification, by cross reading of document, 823
 essel, loss of, as evidenced by lack of news, 205, 2084
 safety of, custom of other owners, as evidence, 355
 presumption of unseaworthiness of, 2085
 log-book of; *see* Log-book
 viciousness, of an animal, evidence of owner's knowledge of, 283
 see also Animal
 View by Jury, general principle, 734
 allowable on any issue, 735
 trial court's discretion, 737
 by part of jury, 738
 unauthorized view, 738
 showers, 1268
 view as evidence, 112, 739
 evidence not to be taken at, 1268
 adjournment of court for a view, 1269
 defendant's presence at, 1269
 Violence of deceased; *see* Homicide, 280
 Voice, as identified by utterance, 245
 as identifying a person, 404
 by opinion testimony, 1464
 Void, parol evidence to show a transaction, 1878, 1913
 Voidable Acts, affected by parol evidence rule, 1913
 Voir Dire, for ascertaining a witness' qualifications, 364, 369, 371, 380, 393
 admissions of a document's contents on, 811

Voir Dire — *Continued*
 right of cross-examination on, 918, 2101
 examining into religious belief on, 1292
 Vote, fraudulently casting, evidence of intent in, 314
 declarations concerning, by a voter, 1195
 disclosure of, privileged
 elector, 1700
 juror, 1825, 1830
 member of legislature, 1842
 see also Ballot
 Voter, declarations of domicile by, 1195
 waiver of privilege by, 1700
 W
 Wagon; *see* Vehicle
 Waiver of inadmissibility, by offering other inadmissible evidence, 46
 of objection in general, 90
 of right of confronting accusers, 929, 941
 of privilege, not to testify against husband or wife, 1725, 1822
 against self-crimination, 1750
 of attorney and client, 1808
 of physician and patient, 1864
 of voter, 1700
 at one trial is not, for later trial, 1751
 of motion to direct verdict, 2015
 of proof; *see* Judicial Admission
 Warrant of land-entry, original required, 791
 see also Judicial Record; Land Office
 Warranty, distinguished from an admission, 636
 shown by parol, 1930
 Weakness of case, evidenced by fraudulent acts, 656
 by conveyance of property, 653
 failure to produce evidence, indicating, 658
 failure to call expert, indicating, 660
 Wealth, provable by reputation, 1085
 by assessors' books, 1101
 Weapon, deceased's carrying of a, as evidencing self-defence, 278
 as evidence of identity, 334
 capacity of, as shown by its effects, 344-355
 condition of, as evidenced by effects, 340
 other acts to evidence carrying concealed, 314
 other instances of its effects, as evidence, 350
 to show capacity or tendency of a, 352
 see also Unfair Surprise
 exhibition to the jury, 731
 Weather, as shown by conditions at other times or places, 342

INDEX OF TOPICS

[Numbers refer to sections §§]

Weather — *Continued*

record of conditions of, 1005, 1100
 Weight, of evidence, distinguished from relevancy, 38
 of circumstantial evidence, 115
 no rules of law for, 11
 Weights, fraudulent, other acts evidencing intent, 307
 Whisky, judicially noticed, 2135
 Whole, existence of, inferred from part, 342
 Whole of an Utterance, put in evidence

general principle, 1547

I. *Compulsory Completeness*

precise words required
 conversations, etc., 1549
 former testimony, 1549
 all parts required
 conversations, etc., 1553
 confessions, 1577
 whole of a writing required
 depositions, etc., 1563
 separate writings, 1565
 lost deed or contract, 1566
 abstract of title, 1566
 lost will, 1566
 public records, 1570
 judicial records, 1570
 bill and answer in chancery, 1571

II. *Optional Completeness*

remainder may be put in, 1575
 conversations, admissions, confessions, etc., 1576
 sundry writings, 1578
 charge and discharge statements, 1579
 account-books, 1581
 separate utterances, 1580
 letters of a correspondence, 1582
 answer in chancery made evidence, 1584
 opponent's inspection making the whole admissible, 1589
 self-contradiction, 591, 1549
 dying declaration, 962

Widow, as a witness; *see* Marital Relationship

Wife, notice to, as evidencing husband's knowledge, 277
 husband's desire or motive to get rid of, 215

character of, in alienation of affection, 325
 of defendant as witness, 396
 testimony of, as disqualified or privileged; *see* Marital Relationship
 communications by or to, as privileged; *see* Marital Relationship
 of plaintiff as witness, 396
 admissions of, against husband, 687, 697, 1713
 acknowledgment of execution of deed, conclusive, 901

Wife — *Continued*

statements of, to evidence pedigree.
see Family History
 expressions of feelings towards husband, 1212
 of accomplice, to corroborate him, 1517
 presumption of coercion by husband, 2065

see also Criminal Conversation; Husband; Marriage

Will, forgery of, character of third person as evidence, 151
 skill in drafting, as evidence of authorship, 168
 testamentary plans, as evidence of execution or contents, 184
 execution of, as evidenced by testator's belief, 293
 spoliation of, as evidence of contents, 662
 proving testator's signature in absence of attesting witness, 883
 production of original; *see* Original Document
 kinds of copy admissible; *see* Copy
 Certified Copy
 calling the attesting witness; *see* Attesting Witness
 undue influence evidenced by other instances, 307
 using testimony given at preliminary probate, 945
 record of probate, to prove execution, 1118

certified copy of, 1160
 testator's statements
 of contents, execution, revocation, undue influence, etc., 1218, 1250

normality of disposition in, 1222
 utterances by maker of, as to sanity, 1224

recital in, as evidence of pedigree.
see Family History
 interpretation of; *see* Parol Evidence Rule, D

proof of, by two witnesses
 personality, 1509
 realty, 1508
 nuncupative wills, 1510
 holographic wills, 1511
 revocations, 1512
 alterations, etc., 1512
 contents of lost will, 1513
 1566

made in a single document, 1945
 proof of, by age of document, 1608
 publication of, 1894
 reading over to testator, 1911
 intent or mistake of testator; *see* Parol Evidence Rule, D
 lost will, clear proof of, 2027
 non-discovery of, as inference of revocatory destruction, 205
 burden of proof of, 2041, 2046

INDEX OF TOPICS

[Numbers refer to sections §§]

Will — *Continued*

presumptions of execution and revocation of, 2069

see also Testator; Document; Execution; Sanity; Insanity

Wires; *see* Negligence; Premises; Highway; Machine

Witness

I. *Qualifications and Disqualifications*

II. *Examination*

III. *Impeachment and Discredit*

IV. *Restoring Credit*

V. *Witnesses Required to be called before others*

VI. *Separation*

VII. *Number*

VIII. *Kinds of Qualified Witnesses excluded or required to be corroborated for special reasons*

IX. *Securing Attendance*

X. *Privilege*

XI. *Sundry Topics*

XII. *Absent Witnesses*

For matters of Attestation; *see* Attesting Witness

Attested Copy; *see* Certified Copy

I. *Qualifications and Disqualifications in general*

general theory, 360

time, 362

burden of proof, 363

capacity is presumed, 363, 369

mode of proof, 364

time of objection, 365

judge determines, 2101

insanity, etc., 367

deaf-mutes, 367

intoxication, 367

disease, etc., 367

blindness, 367

infancy, 370

alienage, race, color, 374

sex, 374

religion, 374

theological belief; *see* Oath

infamy (conviction of crime) as a disqualification, 375

kind of crime, 375

turpitude self-confessed, as a disqualification, 376

accomplice, 376

perjurer, 377

attesting-witness, 377

repudiating one's own instrument, 377

experience as a qualification (expert capacity), 378

general principles, 378

foreign law, 383

value, 422

laymen in expert capacity, 384

medical and chemical topics, 384

sanity, 384

Witness — *Continued*

handwriting and paper money, 385

sundry topics of expert testimony, 387

opinion in general; *see* Opinion *see also* Expert Witness

interest as a disqualification, 388 *see also* Witness, VIII

interest in general, 388

civil parties, 390

survivor against deceased, lunatic, etc., 391

accused, 389

co-indictees and co-defendants, 389

testimony to one's own intent, 392

time of interest; voir dire, 393

burden of proof, 393

mode of proof, 393

time of objection, 393

judge determines, 393, 2101

see also Accomplice

marital relationship as a disqualification, 395

general principles, 396

knowledge as a qualification, 400

knowledge as requiring observation, 400

knowledge of a class of things, 414

burden of proof of knowledge, 401

witness specifying grounds of knowledge, 402

personal observation required, 400

knowledge amounting to a belief or impression, 403

knowledge based on insufficient data, 404

identity, age, etc., 404

state of mind, 404

scientific improbabilities, 404

speculative injuries, 404

that a thing would have been observed, 413

scientific instruments or tables, 407, 408

subordinates' records or scientific books, 406

one's own age, 411

interpreted conversations, 1280

telephone conversations, 412

hypothetical questions, 1416

party's admissions, 634

medical matters (sanity, disease, etc.), 408

foreign law, 408

reputation, 417

handwriting, 418

by seeing the act of writing, 419

by seeing genuine documents, 420

INDEX OF TOPICS

[Numbers refer to sections §§]

Witness — *Continued*

- by admission of genuineness of writing, 420
- by expert comparison, 1480
- value, 422
 - general principles, 422
 - land, 423
 - services, 424
 - personalty, 425
 - sundry rules, 422
- dying declarant, 957
- keeper of books of account, 1012, 1028
- notary, 1097
- recollection; see* Recollection
- II. *Examination*
 - in general
 - mode of interrogation in general, 461
 - leading questions, 462
 - discretion of court in allowing, 462
 - assuming truth of controverted fact, 463
 - calling for answer "Yes" or "No," 463
 - to opponent's witness on cross-examination, 464
 - to hostile, biassed, or unwilling witness, 465
 - to preliminary undisputed matters, 465
 - when witness' recollection is exhausted, 466
 - when witness has immature or feeble intellect, 466
 - to prove a contradiction, 466
 - misleading questions, 451, 467
 - annoying questions, 468
 - repetition of questions, 469
 - multiple examiners, 473
 - length of examination, 473
 - judge's questions, 474
 - narration without questions, 475
 - non-responsive answers, 475
 - improper suggestions, 455
 - prepared deposition, 493
 - answering by reference, 459
 - prior conference with attorney, 459
 - attorney's consultation with sequestered witness, 1316
 - non-verbal testimony, 479
 - gesture, etc., 479
 - models, maps, diagrams, 480
 - photographs or maps, 480
 - verification of, 481
 - maker of, 482
 - production of original, 484
 - of handwriting, 484
 - written testimony
 - sundry modes, 488

Witness — *Continued*

- records of past recollection, 489
- depositions, 490
 - see also* Depositions
- absent witness' testimony, *see* Judicial Admissions
- Question to a Witness
- interpreted testimony, 496
 - aliens, deaf-mutes, persons ill or inaudible, interpreters, translations, 496
- confessions; *see* Confession
- direct examination; *see* Examination, III
- cross-examination in general; *see* Cross-examination
- of one's own witness; *see* Impeachment
- to show bias or corruption; *see* Impeachment
- to contents of a document; *see* Original Document
- to one's own case; *see* Examination, III
- refusal to answer on; *see* Privileges [Examine analysis of "Testimonial Narration or Communication," Vol. I, p. 858.]
- III. *Impeachment and Discredit; see* Impeachment
- IV. *Restoring Credit*
 - general principles, 595
 - good character in support, 596
 - after evidence of general character, 597
 - particular instances, 598
 - bias, interest, or corruption shown, 599, 600, 611, 617
 - self-contradiction, 571, 591, 601, 611
 - contradiction by others, 602, 616
 - discrediting the impeaching witness, 605
 - explaining away a self-contradiction, 591
 - a contradiction, 571
 - bad reputation, 606
 - misconduct, 608
 - bias, etc., 611
 - corroboration by similar consistent statements, 612
 - of statements of an accomplice, 617
 - after impeachment by cross-examination, 614
 - of witnesses in general, 612
 - of party's admissions, 639
 - rape complainant, 622
 - bastard's mother in travail, 626
 - owner of goods robbed, 627
 - possessor of stolen goods, 1245

INDEX OF TOPICS

[Numbers refer to sections. 92]

Witness — Continued

- accused in general, 628
- utterances identifying a time or place, 336
- supporting a contradicted witness, 571
- an attesting witness, 1001
- V. Witnesses required to be called before others**
 - attesting witness; *see* Attesting Witness
 - magistrate's report of testimony, 890, 902
 - sundry witnesses
 - maker of document, surveyor, etc., 897
 - official certificates, 900
- VI. Separation of Witnesses; *see* Separation of Witnesses**
- VII. Number of Witnesses**
 - (a) *excessive number* may be rejected
 - experts, 1401
 - character witnesses, 1401
 - other witnesses, 1401
 - (b) *required number*
 - treason, 1503
 - perjury, 1504
 - sundry crimes, 1506
 - divorce, 1526
 - chancery bill, 1507
 - will of personality, 1509
 - of realty, 1508
 - nuncupative will, 1510
 - holographic will, 1511
 - revocation, alteration, etc., 1512
 - contents of lost will, 1513
 - miscellaneous civil cases, 1514
 - single witness need not be believed, 1500
 - eye-witnesses of a crime, 1535
 - of *corpus delicti*, 1536
- VIII. Kinds of Qualified Witnesses excluded or required to be corroborated for special reasons**
 - judge, 1404
 - juror, 1405
 - counsel or attorney, 1406
 - opinion witness; *see* Opinion Rule
 - accomplice, 1517
 - prosecutrix in rape, bastardy, etc., 1520
 - parents bastardizing issue, 398, 1521
 - surviving claimant against deceased, 1522
 - children, aliens, 1523
 - confessions
 - respondent in divorce, 1529
 - accused, 1530
 - corpus delicti*, 1532
 - marriage in fact, 1537
 - bigamy, 1537
 - admissions, 1542
 - owner, in larceny, 1544

Witness — Continued

- statute of frauds, 1545
- IX. Securing Attendance and Testimony**
 - compulsory process
 - constitutional guarantee, 1670
 - duty to give testimony, 1660
 - production of documents, 1662
 - inspection of premises, chattels, body, 1662
 - officers having power to compel, 1671
 - persons exempt from process, 1849
 - liability to suit or arrest, 1671
 - notice and summons, 1663
 - subpoena *duces tecum*, 1663
 - tender of expenses, 1680
 - expert's fees, 1682
 - ability to attend, 1685
 - illness, 1686
 - merchants' books, 1686
 - sex and occupation, 1690
 - officials, 1688, 1690
 - official records, 1688
 - distance from trial, 1685
 - process upon the Executive, 1849
- X. Privileged Testimony; *see* Privilege**
- XI. Sundry Topics**
 - rules for witnesses in Federal courts, 21
 - testimonial evidence, defined, 109
 - accused as witness, 389
 - intimidation of, by examiner, 468
 - as evidence of guilt of party, 654
 - failure to produce, as evidence of a weak case, 658
 - inference from failure of party to testify, 660
 - subornation of, other attempts as evidence of intent, 307
 - testimony of another, as a basis; *see* Hypothetical Question
 - attesting witness; *see* Attesting Witness
 - preferred witnesses, 897
 - eye-witness preferred in some instances, 897
 - to contents of a document; *see* Original Document
 - to a copy of a document; *see* Copy
 - discovery of names of witnesses; *see* Discovery
 - list of witnesses before trial, 1327
 - indorsement of witnesses' names on indictment, 1327, 1535
 - known to prosecutor, but not indorsed, 1327
 - to execution, showing document to opponent, 1345

INDEX OF TOPICS

[Numbers refer to sections §§]

Witness — Continued

XII. Absent Witnesses

unavailable or privileged, 658
 prejudiced or inferior, not called, 658
 equally available, not called, 659
 excuses for not calling attesting, 869, 880
 death of attesting, 870
 absence of attesting, from jurisdiction, 872
 inability to find attesting, 873
 refusal of attesting, to testify, 878
 attester of recorded document need not be called, 879
 unobtainable, may be dispensed with, 929
 unavailable by reason of death, 931
 absence from jurisdiction, 932
 disappearance, inability to find, 933
 imprisonment, official duty, 936, 937
 insanity or other mental incompetency, 938
 disqualified by interest or infamy, 938
 proof of unavailability, 940
 declarations not to return, 1208
 liability for non-attendance, 1671
see also Attesting Witness;
 Absent Witness; Cross-ex-

Witness — Continued

amination; Examination of a Witness; Distance; Privilege; Wife; Husband; Japanese
 Women, qualified as witnesses, 374
 exempt from attendance, 1690
 Words, interpretation of; *see* Parol Evidence Rule, D
 expert interpretation of technical, 1451
 meaning of, judicially noticed, 208
 as verbal acts; *see* Hearsay Rule, III
 defamatory; *see* Defamation
 Work, capacity of, as evidenced by instances, 354
see also Services
 Workman; *see* Employee
 Wound; *see* Corporal Injury; Weapons
 Writ, proof of service of, without production, 801
see also Judicial Record
 Writing, as the act itself, 901
see also Handwriting; Documents required by law; *see* Parol Evidence Rule, B

X

X-ray photograph, testimony based on, 483
 use of, machine, 407

1

2

3

1

2

